

# Towards legalised corporate secrecy in the EU?



**How industry, law firms and the European Commission worked together on EU “trade secrets” legislation.**

## SUMMARY

This report is based on the analysis of hundreds of documents,<sup>1</sup> obtained through an access to documents request, exchanged between the European Commission's DG Internal Market and the main corporate lobby groups involved in the development of the EU's draft legislation on so-called “trade secrets”.

Industry's main message throughout the process has been that trade secret theft is a major threat to the EU economy that demands a legislative initiative to improve and harmonise rules on the matter. Industry's recommended approach for this was to define trade secrets as a form of intellectual property (IP).

From the very beginning the Commission took a strong interest in the idea and went on to collect the evidence it needed to demonstrate that legal "fragmentation" and trade secret theft would, indeed, be a threat.

But it outsourced the research to law firms that have a structural interest in the development of new legal protection tools for their corporate clients. In the end, industry and the Commission acted together, working hand in hand on the methodology of the very evidence collection for the research, jointly organising a “Commission conference on trade secrets”, even coordinating media outreach on one occasion.

Eventually, the Commission followed industry's demands almost completely, stopping short of creating a new IP category for trade secrets in the EU but granting the associated means of legal redress.

The collaboration between DG Internal Market and the lobby groups seems to have extended to lobbying the other DGs, jointly preparing the submission to the Commission's Impact Assessment Board, and lobbying the two other EU legislators, the Council of Ministers (Member States) and the European Parliament.

When asked, the Commission did not dispute much of the above

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<sup>1</sup> All documents referred to in this report that are not online are available on request at CEO.

and failed to see how working for three years on a quasi-daily basis with lobby groups could be a problem. Emails show the opposite is actually true: the Commission, once the decision to initiate new legislation was taken, actually needed industry lobby groups' help. The Commission for example did pro-active outreach to business lobby groups to be sure that as many companies as possible participated in the public consultation. Non-industry groups were completely absent from the Commission's drafting process until the public consultation, and no pro-active outreach to them seems to have been undertaken by the Commission.

Three other important observations should be made about this correspondence:

- Reference was often made to the upcoming TTIP negotiations to justify the action, as comparable legal action was being drafted in the US, and direct lobbying of TTIP negotiators to get trade secrets protected as IP under TTIP was undertaken.

- Lobbying is made easier by the lack of capacity on the public side of the discussion. Between 2010 and June 2012, only one policy officer and his head of unit were in charge of the technical development of the file, and in June 2012 one other policy officer joined them. Other levels of the administration also intervened but at the management level. On the other side, industry sent in teams of consultants, lawyers and executives, background legal research, field examples, and senior academic contacts –all free of charge for the Commission.

- To the Commission's credit, there are at least two moments in the correspondence where the head of unit objected to industry proposals that went too far from a political independence point of view (a meeting proposal from the fragrance industry to discuss a template draft legislation, and angry remarks about suspicious-looking exchanges between the law firm working for the Commission (Baker & McKenzie) and lobby groups active on the file), but his staff never wrote anything of the sort. On the contrary, there are several instances where they actually facilitated the lobbying work of industry by introducing various lobby groups and the consultants working for the Commission to one another. Who doesn't appreciate competent free help for one's work?

## A very contentious proposal

In January 2015, French journalists [mobilised](#) massively against a long [amendment](#) on the protection of “trade secrets” tabled by the government within a broader piece of economic legislation going through the Parliament. This unusual mobilisation was undertaken to defend the whole profession: these amendments foresaw that the unauthorised acquisition, use and disclosure of trade secrets would be punishable with 375,000€ fine and 3 years in prison (and twice that when the country's “sovereignty, security and essential economic interests” are at stake). The justification was to fight industrial espionage, but the text used a definition of “trade secrets” so broad that almost any internal information within a company could qualify, endangering business reporting, investigative journalism on corporations and the confidentiality of journalistic sources. The government quickly understood the text was not acceptable to the press as it stood and withdrew it.

This was only the beginning, however, because it quickly appeared that these amendments were about adding to French law the key elements of an EU text still being debated by the European Parliament on the same issue (and with the same justification: fighting industrial espionage). The draft directive on the “protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure” was published by the European Commission in November 2013 and amended and approved by the European Council in May 2014.

While it does not foresee the same drastic penalties as what was considered by the French government (the draft Directive only harmonises civil law remedies, not criminal law), the draft directive has also attracted the [criticism](#) of a very broad range of civil society groups (including CEO and many others such as the European Federation of Journalists, the European Trade Union Confederation, Wikileaks, Public health NGOs, whistleblowers' defense organisations...), and for comparable reasons. The same vague and all-encompassing definition of trade secrets is used, the text defines secrecy as the norm and freedom of information as the exception (with the burden of proof on the journalist or whistleblower to demonstrate that disclosure was needed and that he has acted in the public interest), and endangers workers' mobility and corporate accountability.

It is also feared that the directive would provide additional legal arguments for companies to refuse the disclosure of the data they file with public authorities for their products' market authorisation, such as clinical trials for medicines or toxicological data for chemicals and food products (such disclosure is seen as indispensable to guarantee a scientifically rigorous assessment of these products). The Commission says its text is “neutral” on this point but lobbying goes on in the European Parliament with clear attempts in this direction.

By going as far as possible towards making trade secrets a new category of intellectual property (such a new category is not created but trade secrets “holders” are given means of legal redress

comparable to what they would have obtained if it had been created), the draft directive might even limit the free circulation of knowledge and workers and thereby innovation, one of the arguments nevertheless used to justify it (a stricter legal protection of trade secrets against misappropriation is presented as potentially contributing to enabling research partnerships between companies). M. Gallo, a French MEP supportive of the project who chaired a December 2011 event on the issue, indeed pointed out then that *“one hurdle is to make it understood that IP is associated with development, and not monopolistic rights that inhibit creation and innovation”*.

Recent cases where the trade secrets protection argument is used by companies in legal proceedings against whistleblowers, journalists and employees show that fears about the consequences of the draft EU directive on civil liberties and the balance of power between employers and workers are not unfounded.

For instance, whistleblower Antoine Deltour, one of the sources in the [Luxleaks](#) affair, as well as French journalist Edouard Perrin, who first revealed it, are being [sued](#) by PriceWaterHouseCoopers in Luxembourg for alleged trade secrets “violation” after they disclosed scandalous tax deals brokered by PWC between Luxembourg and hundreds of multinationals, an important source of tax evasion and therefore public indebtedness in the EU.

This dimension of the problem was not ignored by the Commission. Its [impact assessment](#) discusses to what extent the text might threaten whistleblowing and journalistic freedoms, and

concludes that it *“does not disproportionately limit the freedom of expression and information, and in particular journalistic freedom”* since there is a necessary *“balancing”* of interests to be made between the right of trade secrets owners and freedom of expression and information, pending that a safeguard clause is introduced to protect journalists and whistleblowers from abuse. This safeguard clause however is seen by journalists as completely insufficient.

In the US, where trade secrets are considered a form of intellectual property, ongoing legal proceedings show how trade secrets litigation has become a daily resource for companies to expand the scope of what they can claim as their property, at the expense of the rest of society, particularly workers. Ongoing litigations show a doctor suing the state of Pennsylvania for being forced to sign a non-disclosure agreement to obtain [the composition of fracking fluids for medical purposes](#); a company suing a former employee to claim [ownership of the social media contacts](#) made by this employee during her time at the company; or three former Nike designers suing the company after they realised it had [spied \(in vain\) on their correspondence](#) in search for evidence for trade secrets sharing with competitor Adidas.

The official justification for the text is the fight against industrial espionage. However, while the main culprits for such espionage are generally thought to be governmental intelligence agencies, the sophistication of these players' operations and their status means that identification and legal redress is very difficult. By contrast,

former employees, easier to identify and prosecute, constitute the large majority of recorded legal cases for trade secrets misappropriation and it is unlikely any legislation can change this situation. One of the difficulties is therefore to find a way to enable legal redress against unfaithful employees without undermining employees' collective rights.

One possibility to avoid the problem would be to narrow the scope of the text to economic competitors and intentions of commercial gain, which is actually the existing legal standard in the majority of EU countries where trade secrets' illegal acquisition, use and disclosure is regulated through unfair competition legislation. Harmonising unfair competition legislation however was not an option followed by the Commission, and amending the text in this direction would probably be difficult as this would mean a fundamental change in the text's core structure and philosophy. Remaining options are therefore damage control, to try to bring legal clarity and certainty to the exceptions via amendments, or outright rejection.

This situation raises several questions. How is it possible that the Commission risked to undermine fundamental democratic rights when drafting the text? Why did they not foresee that such a proposal would face very serious opposition, to the point that the entire text would risk being rejected or severely amended? Could it be that “too successful” corporate lobbying played a role?

To find out, we filed an [access to documents request](#) to the Commission to obtain the correspondence between its department

in charge of the file and the industry groups we suspected were the key players. Our intuition was correct: we received hundreds of documents, which we shared with journalists<sup>[fn]</sup>Nick Mathiason, from the Bureau of Investigative Journalism in London, and Martine Orange, from Mediapart, in France<sup>[/fn]</sup> to share the analysis and reporting effort – although some of the documents still haven't been disclosed, apparently for capacity reasons. It must be noted that although all these documents were stored electronically at the Commission, we were only sent paper versions, a major obstacle to analysis and subsequent disclosure<sup>2</sup>. This report describes some of what we found in them.

## I. Meet the lobbyists

The correspondence between the Commission and the lobby groups trying to influence its thinking on trade secrets legal protection illustrates how industry often manages to convince the Commission because the discussion happens in a vacuum, among a few individuals. At these early, technical levels of discussion, which are absolutely key because this is where the whole debate is framed, there is often little or no other interests intervening, and no media scrutiny. The trade secrets file is a near chemically pure example of this phenomenon.

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<sup>2</sup> We would like to thank, on the other hand, the person who organised them.

Unquestionably, the main driving force in the lobbying campaign from industry's side has been the **Trade Secrets & Innovation Coalition (TSIC)**, whose demands to the Commission in early 2010 seem to have spurred the Commission into action on this file.

The TSIC is a low profile organisation, a sort of dedicated working group of multinational companies on trade secrets protection lobbying. It has no website, and its work was facilitated by global law firm White&Case until late 2011, when it moved to Hill&Knowlton (H&K),<sup>[fn]</sup>H&K is a subsidiary of marketing and PR giant WPP.<sup>[/fn]</sup> a global lobbying consultancy. Why exactly it changed consultants is not clear, and neither White & Case nor Hill & Knowlton answered this question. One possible explanation? Thomas Tindemans, Counsel on EU practice at White & Case, was in charge of the file at the beginning but became the EU Managing Director of the Brussels office of Hill & Knowlton in September 2010; he took charge of the file again when the TSIC moved to Hill & Knowlton, a bit more than a year later.

The TSIC case is an interesting example of the flaws of the EU's voluntary lobbying transparency register. White & Case, the law firm who represented the interests of the TSIC until 2012, is not registered, did not register its client, and answered all our questions with a blanket statement that *“any work around trade secrets or engagement with EU institutions would have been rooted in legal advice around specific client work. Therefore, we would decline to comment further.”* This is in line with the EU inter-institutional agreement that created the register, which stipulates that legal counsel

activities are indeed excluded, but much less so with what White & Case employees actually wrote to the Commission. When T. Tindemans wrote in March 2010 to a Commission official that *“something needs to be done”* on trade secrets legislation, was this legal counsel to a client or lobbying?

The TSIC was eventually listed by Hill & Knowlton as a client and declared separately in the Register, but in January 2014, two months after the Commission published its legislative proposal and four years after the TSIC had started lobbying it.

But problems don't stop with belated registration. According to Hill&Knowlton's entry in the EU's lobbying register, the TSIC would have brought in a revenue of under 50,000€ for 2013, while the TSIC's own entry in the register states a lobbying budget between 50,000 and 99,000€ - a surprisingly low amount given that it declares 18 employees (the equivalent of five full-time on this file). After we sent H&K a few questions on their lobbying work with the TSIC, the coalition's entry in the lobbying register was changed: the 16 staff working 5-10% on the file were deleted and the lobbying expenses figure was increased to 60,000€ - Hill & Knowlton said this was because of double accounting and inaccurate calculations by the Register<sup>3</sup>. According to H&K, this

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3 *“Our previous entry did not take into account (a) de minimis principles excluding employees spending only a minimal percentage of their time on the activities covered by the register (b) double accounting – as the time declared for the 14 additional individuals is covered by their individual company or association entries, given that they are neither TSIC or Hill+Knowlton Strategies’ employees. The figure quoted of five full-time-equivalent employees is based on an automatic calculation by the Transparency Register and is incorrect. This has now been corrected.”* Email from Hill & Knowlton to TBIJ in response to questions by TBIJ and CEO, 15 April 2015.

budget would have been stable from 2011 with about 25% of it allocated to lobbying the institutions, the rest used for coordination activities among members.

Until 1st April 2015, the TSIC's [entry](#) in the EU's Lobbying Transparency Register failed to disclose its members and was very vague on its activities. According to emails released by the Commission and the TSIC's updated entry in the register, the companies behind it are industrial gas supplier Air Liquide, transport and energy firm Alstom, chemical giant DuPont, General Electric, Intel, Michelin, Nestlé and Safran (an aircraft components, missiles and aerospace multinational). Some of these companies, in particular **Alstom**, **DuPont** and **Michelin**, lobbied the Commission directly in addition to what the TSIC was doing, presenting their specific examples of trade secrets theft on multiple occasions (including the Commission's official conference on trade secrets held on June 29th 2012).

H&K further specified in their response to our questions that the TSIC was working “*in collaboration with Business Europe, the European Chemical Industry Council (CEFIC), Europe’s 500, the European Semiconductor Industry Association (ESIA)<sup>4</sup> and the International Fragrance Association (IFRA).*” However, a press release sent by the TSIC on June 29th lists CEFIC, IFRA and Europe's as members of the coalition.

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<sup>4</sup> The European Semiconductor Industry Association (ESIA) was not included in the access to documents request. It is not listed in the EU Lobbying Transparency register.

**Europe’s 500** [describes](#) itself as a “European organisation and networking platform for growth companies and their entrepreneurs.” Created in 1996, its main activity seems to be organising high-level public awards events where they publish their list of the most innovative companies in Europe but little seems to have happened since 2013. Their role in the lobbying campaign seems limited to have procured an SME/start-up speaker for the Conference organised on June 29th , R. Bonet, CEO of Fractus SA, a Spanish IT company. The contact was made via H&K. Interestingly, H&K is a partner of Europe's 500 and Tindemans writes on his LinkedIn [profile](#) that he has been an executive officer there since 2007. However, Europe's 500 is not listed in the EU Lobbying Transparency Register, either independently or as a client of H&K if this was the case.

The **European Chemical Industry Council (CEFIC)** is the chemical industry's trade association and the largest lobby group in Brussels with a 150-strong office. Reported sometimes on the internet as a member of the TSIC (DuPont is a common member), it is not listed as such in the EU's lobbying register but did undertake common activities with the TSIC, and was lobbying the Commission on trade secrets as early as 2006. Throughout the Commission's drafting process, their most insistent demand has been to try to get the directive cover regulatory data, in other words make sure the directive would give them legal grounds to oppose disclosure demands by third parties to public authorities related to the information companies file with public authorities for the safety assessment of their products as a basis for these products' marketing authorisation.

## Lobbying for regulatory data secrecy – a parallel campaign

It is important to point out that the trade secrets file is not the only avenue used by CEFIC to lobby for the non-disclosure of their data filed with public authorities. The TTIP negotiations are another: a 31st October 2012 [joint proposal](#) for the regulatory cooperation aspects of the trade negotiations by CEFIC and the American Chemistry Council, sent to the Office of the United States Trade Representative, made clear from its very first point that “ensuring appropriate protection of confidential commercial information” was very important to them. They added: “Nothing in a chemical regulatory impact analysis should require the disclosure of confidential information, including information that would compromise a financial or commercial interest if disclosed, or if it is prohibited by law”, and proposed to use “robust data summaries” to “allow increased access to and transparency in information without jeopardizing commercial interests.”

But they also lobbied the highest levels of the Commission directly. A 7th March 2014 [joint letter](#) by EFPIA (the pharmaceutical industry's lobby group, fighting disclosure of clinical trials data), **Europabio** (the biotechnology industries' lobby group, fighting disclosure of toxicology data for GM crops for instance) and **ECPA** (the pesticides industry's lobby group, part of CEFIC) to the Commission's Secretary-General Catherine Day insists on “our strong concerns about the current implementation by EU agencies of the legislation dealing with public access to documents”. “Our memberships are extremely concerned at the trend they are seeing with regard to the implementation of EU transparency legislation (Regulations 1049/2001 & 1367/2006 and Directive 2003/4) and their likely effect on the competitiveness and attractiveness of the European Union as a place to do business for innovative companies, including many

SMEs”.

Importantly, Catherine Day [answered](#) favourably to their request. “Thank you for your letter of 7 March 2014 in which you are pointing to the relationship between the European 'Access-to-Documents' legislation (Regulation 1049/2001) and certain elements of the Aarhus Regulation (1367/2006) that could have a direct impact on the effective protection of commercial interests and intellectual property in the EU. [...] **The European Commission shares your concern that a correct balance must be found between the two legal instruments** (emphasis added). [...] At this stage I feel that, a meeting between representatives of your organisations and the Secretariat-General at technical level would be the most suitable solution.” It is not clear at this stage what the outcome of this process was.<sup>5</sup>

**The International Fragrance Association (IFRA)**, the global trade association of the fragrance industry, is based in Geneva but has a Brussels office too. An affiliate member of CEFIC, they began lobbying the Commission from early 2011 because the fragrance industry faces a major challenge: while its traditional method for protecting its key assets – formulae in particular – was secrecy, the constant progress of reverse engineering technologies makes it easier nowadays for competitors to access these. IFRA's lobbying to get an IP protection on such secrets has therefore been very intense. They hired two lobbying consultants to help them:

- Charles Laroche, a senior Belgian lobbyist who started a consultancy ([Laroche Conseil](#)) after a career at Unilever. Laroche

<sup>5</sup> The letters between the three industry trade associations and Catherine Day's office were obtained by journalist [Stéphane Horel](#) via an access to documents request

Conseil declared a revenue from IFRA of between 100,000 and 199,000€ in 2014 .

- Joseph Huggard, also an experienced [lobbyist](#) who created a consultancy (The Huggard Consulting Group) after an earlier career in Exxon Chemicals and Glaxo SmithKline. Claiming “over 30 years experience of working with some of the most controversial substances for a variety of industries“, selling the services of a team of [product defense veterans and high-level risk experts](#). In 2014, he declared between 10,000 and 24,999€ in revenue from IFRA.

As with almost every policy file with an interest for big business, **Business Europe**, on paper representing all EU employers but in practice more multinationals than SMEs, was also active on the trade secrets file from early 2012 onwards, taking care of the high-level political work and kindly obliging the Commission's demands to help it reach out to companies around the EU in order to ensure good participation by businesses in the Commission's economic survey and public consultation (no other civil society group got the same privileged treatment). Business Europe's national members such as France's **MEDEF** were also active, to a lesser extent. The Association Française des Entreprises Privées (**AFEP**), a powerful and discrete lobby group in France, also followed the file.

## II. Framing and convincing: IP vs. unfair competition

In any lobbying undertaking, the framing of the problem is the most crucial moment. In this case, it seems that the TSIC's demands to have the Commission issue new legislation on trade secrets were met from the very beginning with lots of sympathy.

The TSIC's campaign seems to have been launched early 2010. A March 2010 letter by Tindemans, then a Brussels based lawyer with White & Case, to Margot Froehlinger, who at that time was the director of the Commission unit dealing with copyright and trademarks, summarises their core lobbying message:

*"In these difficult times R&D efforts are being undermined by products resulting from trade secret theft entering the European market. The implementation of the coalition's proposals, namely (i) that the Commission publicly recognise the protection and enforcement of trade secrets and (ii) ultimately the harmonisation at European level, would go a long way towards alleviating this pressure. Something needs to be done and we hope therefore that we can assist you in shaping a coherent and effective strategy for including this item on the European Commission's agenda for IP rights."*

Two weeks later, Tindemans followed with a series of trade secret violation cases involving TSIC members Alstom, Dupont and Michelin. It prompted a positive response from Froehlinger:

*"If there was more support in particular from the European*

*parliament, we could also consider a harmonisation at EU level of unfair competition rules. This is long overdue and is one of the missing links in the Internal Market. This could deal, not only with trade secrets, but also with look-alikes and other types of copying which fall short of IPR infringement but are economically very harmful for European companies.”*

Froehlinger then added:

*“Should you possess any more concrete information about the form and scope of trade secrets (including know-how) in different EU members states, we would be extremely pleased if you could share this information with us”.*

### **Trade Secrets Protection: via intellectual property or unfair competition legislation? A TTIP connection**

As the exchange above shows, the TSIC framed their demands for trade secrets protection within the EU's intellectual property rights strategy, but the Commission's initial reaction was rather to suggest action on the level of unfair competition legislation. The fact is that, as both the Commission and the TSIC knew, the vast majority of EU Member States already do protect trade secrets with unfair competition legal instruments, which has the important benefit of restricting the scope of the law to commercial entities and actions as well as not requiring demonstration of IPR infringement (even though, according to various sources, the key problem for companies remains demonstrating the misappropriation). Considering trade secrets as intellectual property, on the other hand, would limit redress against broader unfair competition practices but would, on the other hand, enable their owners to sue whoever would acquire, use and

disclose them without their authorisation, regardless of the reasons for the acquisition (the core problem with the current text, which prompted the most opposition). The Commission eventually followed this line of thinking, stopping short of creating new IP rights for trade secrets but granting the legal redress means associated, despite the additional advantages of the unfair competition framework as underlined by the Commission in its first response. The Commission's May 2011 communication on “A Single Market for Intellectual Property Rights” [recognised](#) that considering trade secrets as intellectual property was a real issue, concluding that “*Considering the complexity of this issue and its various implications, the Commission needs to pursue its reflection and gather comprehensive evidence before taking a position on a possible way forward*”. Indeed, whether trade secrets should be considered a form of intellectual property has been a matter of academic and judicial debate for a long time.

But in 2013, the Commission did not even consider unfair competition legislation harmonisation among the various scenarios it considered in its impact assessment. How did industry manage to convince the Commission to follow the IP route rather than the unfair competition one? When asked about this, the Commission answered, in perfect bureaucraspeak, that “*Unfair competition law covers a broad area, most of which remains under national law. The Commission decided to make a targeted intervention, addressed at a specific problem. This is without prejudice to any future action that the Commission may decide to take on Unfair Competition Law, if justified.*” The documents show a certain persistence in the messaging from lobby groups, with for instance the TSIC submitting [comments](#) to a public consultation on IP enforcement stating that “*trade secrets are recognised in the EU as fully being part of IPRs and, as such, should not be treated differently from industrial property rights*”. In July 2012, a TSIC member (an executive from DuPont) [stated](#) that the EU could “*expressly include trade secrets as a form of IP protected by the*

*directive on enforcement of IP rights”.*

Could the TTIP dimension have played a role? An October 2013 [joint letter](#) from Business Europe, the National Association of Manufacturers (Business Europe's US counter-part) and the Transatlantic Business Council to the two politicians in charge of the TTIP negotiations in the EU and the US, K. De Gucht and M. Froman, explicitly demands that the two blocks “*ensure that their respective trade secret laws contain the following core elements that make up a model and modern trade secret law relevant to the digital economy: - Expressly recognizes trade secrets as intellectual property in line with TRIPS Articles 1.2 and 39.*”

According to a source familiar with the matter, Jean Bergevin, the head of the unit in charge, would have wanted to go for IP protection for trade secrets, fully in line with what industry wanted and further than what was eventually published. Why this was not done does not appear in the documents.

### **III. From lobbying to partnership: the close relationship between the Commission, the lobbyists and the consultants**

Its correspondence with business lobbyists shows that the Commission, once it had decided to initiate legislation on the matter, treated the lobbyists as partners, reaching out for their help every time it was needed, be it to obtain information or to lobby the other EU institutions. It actually even facilitated the work of the lobby groups by introducing them to each other along the way.

Asked about why it did so and whether this could be a problem, the Commission simply answered that “*The Commission is transparent about its contacts with other stakeholders interested in the same policy areas*”.

#### **3.1 A coveted first legal study – law firms' collective interest in trade secrets protection**

From the first exchanges onwards, the TSIC, then represented by White&Case, sent to the Commission not only case studies (those from Alstom, Michelin and DuPont) but also legal briefings about trade secrets protection legislation in various EU Member States and abroad, in order to demonstrate the need for EU-wide legal harmonisation. The applicable civil and criminal provisions in the US and Japan in particular were detailed (trade secrets are considered a form of intellectual property in these two countries).

On September 30th 2010, an email from the TSIC to the Commission shows that things had not progressed very much there. The initial aim to have trade secrets mentioned in a 2010 European Commission communication on a single Market Act (“*50 proposals for improving our work, business and exchanges with one another*”) did not succeed (the topic is not discussed at all in the [paper](#)), and a meeting with the Commissioner's cabinet showed that there was still little awareness of the issue at the Commissioner level (“*One thing that was a little surprising was the issue of trade secrets seemed to be quite new to him [... ] is this*

*a topic on which Mr XX has been briefed? In any event we left him a pack of information for review, but obviously briefing from within the Commission would be more useful").*

However, a first element of good news for White&Case: the Commission took the decision to outsource (budget: 60,000€) a legal study to assess the legal situation among EU Member States, which was a job White & Case had already largely done on TSIC's behalf. Perhaps an opportunity to get paid for this work by the Commission, after having been paid by the TSIC members? A policy officer at the Commission was kind enough to tip the lobbyists: *"I am sending you the preliminary version of the study, for you to see whether this would be something you would be willing to bid for"* (email from the Commission to White&Case, 21st September 2010). However, there was a difficulty: the draft Invitation to Tender (ITT) *"requires a statement that there are no conflicts of interest. We touched upon this last time but thought it would be good to discuss again."* Was this an issue because White & Case employees were acting as lobbyists at the same time on the same issue? We did not get any answer to this question.

In the end, White & Case was not chosen by the Commission, who chose another global law firm, Hogan Lovells. The document explaining this decision has been entirely redacted by the Commission, so it is not possible to know why the Commission chose one law firm and not the other. An October 15th 2010 email from White & Case refers to a *"frank and open discussion"* with the Commission, which might be related.

It is interesting though to see that Hogan Lovells, just like most corporate law firms, is not selling legal expertise on trade secrets to the Commission only. It is [selling](#) legal advisory and defence services on trade secrets to all potentially interested clients. The broad support for the Commission's initiative among corporate law firms is simple to understand: it adds a tool to the toolbox of services they can propose to their clients. On the other side of the Atlantic, for instance, the law firm Covington & Burling is [acting](#) as a lobbying consultant to a "Protect Trade Secrets Coalition" coalition of multinational companies with [comparable goals](#) to the TSIC. It is striking that the Commission uses consultants with such a structural interest in developing their own market.

The lobbying by White & Case on behalf of the TSIC continued in 2011, and in particular after a new head of unit, Jean Bergevin, was [appointed](#) in April 2011 to lead the work of the Commission on this file. I. Forrester, a lawyer at White & Case, used the opportunity to introduce him to a US academic specialised in trade secrets, R. Milgrim: *"A friend of ours, Jean Bergevin, has been given a new job and a new task within the Commission, which is to consider the problems presented by stolen trade secrets"* (email from White & Case to Milgrim, cc J. Bergevin, 1st July 2011). The introduction was followed by a detailed correspondence, which prompted the following remark by Forrester: *"I am delighted to note that two talented persons are exchanging views and ideas fruitfully."* (email from White & Case to R. Milgrim and J. Bergevin, 28th July 2011).

## 3.2 Assessing the economic need for trade secrets legal protection

The [economic survey](#) assessing the importance of trade secrets for European companies is a key piece of information because it is the evidence on which the Commission based its demonstration that a legal harmonisation of trade secrets protection in the EU was needed. Its main finding that “86% of companies and research institutes participating in a recent survey considered trade secrets as an important tool for business and research bodies in the EU to protect their valuable information” is the first sentence of the impact assessment's executive summary. For this reason, the way it collected the evidence is very important, and in particular the questions asked.

### 3.2.1 “Policy-based evidence-making”

One document is particularly interesting to understand how the European Commission sees its economic survey. It is a letter from Michel Barnier, then Commissioner for the Internal Market, sent to Business Europe's then director Philippe de Bück on May 16th 2012. It is worth quoting at length because it describes how the Commission is collecting the evidence it needs to demonstrate the necessity for the new legislation, as opposed to collecting evidence to assess this necessity:

*“In order to complete the information necessary to evaluate the*

*impacts of any future measure, my services have in the meantime commissioned a study on the economic impact of trade secrets. This seeks to provide a rigorous assessment of just how important their role is in the competitiveness of European businesses. It will include an EU wide survey involving the most concerned industries and my hope is that we will be able to demonstrate that all businesses in our services and knowledge based economy and in particular SMEs rely on trade secrets. In that manner we will demonstrate that the current fragmented legal framework for their protection undermines competitiveness and therefore investment and job creation in the Single Market. I sincerely hope that your organisation will continue to assist us in achieving this objective and am delighted to hear from my services of the excellent cooperation to date.”*

The [contract](#) established in February 2012 between the Commission and the global law firm Baker & McKenzie, hired to complete the economic survey (cost: 400,000€), stipulates: *“The study is aimed at allowing the Commission to make an informed assessment of the role of trade secrets and confidential business information as possible drivers for innovation, competitiveness and economic growth in the EU.”*

The study's [conclusions](#), in turn, appear perfectly aligned with the Commission's objectives:

*“The Study describes the current fragmented scenario, its commonly perceived weaknesses and the widespread appetite for a harmonized approach. The final recommendations advocate for*

*legislative initiative on trade secrets protection at the EU level and highlight the areas where intervention would be most beneficial in terms of balanced economic growth and competitiveness for the Internal Market”.*

### **3.2.2 Helping the lobbyists lobby the consultants**

But the Commission was not the only one with an agenda for this survey's outcome. On 22nd of February 2012, two weeks after the contract for the economic survey was awarded to the Milan office of Baker & McKenzie, a legal officer at DG Internal Market obliged a TSIC request and sent them the contact details of the two lawyers in charge of leading the economic survey. In the following days, the TSIC, now represented by Hill & Knowlton and again by T. Tindemans among others, asked for a joint meeting with B&M and the Commission, which the Commission was happy to facilitate (it actually had to insist to convince B&M, as the contract stipulated a fixed number of meetings). The meeting eventually took place on March 22nd.

What was the nature of the following exchanges between the consultants and the lobbyists? Only documents where the Commission in its copy were obtained, but the interaction seems to have been intense.

A little too intense? Four days before the conference, on 25th of June 2012, an exchange between B&M lawyers and Bergevin points at a process possibly having gone out of hand. Following an

email by B&M explaining their doubts about the idea of sharing the draft survey and methodology in advance with the conference's participants and explaining that TSIC and IFRA had already received it but would only be able to send comments after the conference for internal organisational reasons, Bergevin reacted strongly: *“Apparently you have been testing the survey with certain companies and trade associations. These I understand have a revised version that we have not seen? Moreover you propose to wait for their reaction and as a consequence will not be able to present it to the conference because their internal procedures!!!! I find all of this very worrying. First you have a contract with us not certain interested industry groups. Secondly this approach is biased and totally lack transparency that we are all bound by. I would therefore insist that you transmit the revised questionnaire and a shortened version of the survey methodology no later than this evening”.*

This was immediately followed by an email from another (more senior) lawyer at B&M, explaining that it was all a misunderstanding and that *“I perfectly understand your point and agree on the absolute need to keep distance from interested industry groups. Be assured that we are well aware that this is the name of the game and that you, the Commission, are the only referee. In particular, needless to say, we don't even dream of playing any tricks with trade associations: besides any other consideration, we would never put our reputation at risk. [...] We may hear comments from multiple parties (actually this is the purpose of our exercise), but in no event we would take account of*

any “suggestion” possibly received from the field.”

On 16th July 2012, two weeks after the conference where the survey methodology was presented, the TSIC sent an email to Baker & McKenzie with a long list of comments, making 16 specific suggestions for change. On 19th July 2012, an email was sent by a consultant working for IFRA (C. Laroche) to F. Gaudino, a lawyer at Baker & McKenzie, with editing suggestions (an IFRA colleague followed up with edits in track changes in the draft survey itself the next day, with some common ones with the TSIC's). On the same day, Ms Gaudino had sent an email to both IFRA and the TSIC to share with them a revised version of the questionnaire, saying that “*we tried to accommodate your suggestions as well as of all the other stakeholders who provided feedback*”. A [comparison](#) with the final survey document by the Bureau of Investigative Journalism shows that half the suggestions made by the TSIC were taken on board by B&M.

This, however, is seen as unproblematic by the Commission. “*As part of the study, it was foreseen to present a draft questionnaire for the survey at the June 2012 Conference organised by the Commission with the intention of receiving feedback from interested stakeholders. The Conference was public and open to all. On the basis of that feedback and the Commission feedback, Baker and McKenzie refined the questionnaire for the survey.*”

### 3.2.3 “Debating” trade secrets

So, on 29th June 2012, the Commission organised a public conference on trade secrets, whose main purpose was indeed to present the preliminary findings and methodology of the B&M economic survey. But while the Commission presents the conference as “A Commission Conference” on its [website](#), this is somewhat exaggerated: the conference was jointly organised with Baker & McKenzie, as foreseen by their contract, and all the lobbyists and consultants competed in courtesies to have their own representative on the panels. The competition became so tough that Baker & McKenzie even complained at some point that they were not getting all the visibility they had expected from the contract's terms: “*the conference is one of the Project' tasks and visibility, not money, is supposed to be the reward for us*” (email from B&M to the Commission, 5th June 2012).

Baker & McKenzie was still very much in a leading position during the conference, flying in a US economist from the firm (Dr. Thomas S. Respass III) and presenting their work. They also brought in the only non-industry external speaker of the event, an Italian academic, to present the methodology of the survey.

From the Commission's point of view, there were clear advantages in organising a public event with interested lobbyists: it took less than 30 minutes to confirm the participation of three industry speakers from the TSIC. The usual suspects with their usual examples: Alstom with a power plant in Bulgaria, Michelin with its prototype tire stolen in Japan in 2005 during a rally, and DuPont with various trade secrets related to kevlar manufacturing being

stolen.

Besides Commission officials, other speakers and panellists included the two Hogan Lovells lawyers who wrote the study on the existing legal framework for trade secrets protection in the EU for the Commission, four other law firms (Bardehle Pagenberg, Gleiss Lutz, Jones day and IIPTC), and the CEO of a start-up (Fractus SA). The [minutes](#) of the conference indicate that the potential impact of the legislation on non-industry sections of society, in particular journalists, whistleblowers or workers, was not discussed (employees were only referred to within examples of misuse or theft of trade secrets, so as potential threats).

### 3.2.4 Coordinating media outreach

On the eve of the conference, the TSIC sent the Commission a list of journalists who had expressed interest in covering the conference or at least receiving a press release (media titles mentioned include Europolitics, Bloomberg, European Voice, La Tribune, Dow Jones, IP Watch, Financial Times Deutschland and Mlex – AFP, Financial Times, Agence Europe and Les Échos were also said to be interested but probably too busy for coverage), asking *“Thank you for letting us know if there will be a press statement from your side?”*

The Commission replied with a copy of the draft official press release (midday express, in EU jargon) to be published the next day. To which the TSIC replied sending its own.

Asked whether coordinating press releases and media outreach with lobby groups was appropriate, the Commission answered the following:

*“The conference held in 29 June 2012 ensured an open public debate on the legal protection of trade secrets, their economic relevance and the survey to industry, and stimulate participation of all stakeholders that had not yet been expressing any views on the subject. Strong press coverage is one important way of capturing the public’s attention and stimulating such debate.”*

### 3.2.5 Business Europe to the rescue

A few months later, on November 15th 2012, the Commission called Business Europe to the rescue again: the survey foreseen in the study needed business participation within a short deadline.

The email explained that *“in order for the Commission to be in a position to consider, prepare and propose an initiative on legal protection of trade secrets against misappropriation, a high rate of participation in the survey is of great importance. However, the timeline for participation in the survey is very short, namely until 3 December.*

*We think that Business Europe can play an important role in mobilising companies to engage in this exercise. Please find attached a link to our webpage where the survey is announced.*

*We will also launch in a few weeks a public consultation on the*

*topic, and once again a high level of participation will be crucial in order to gather representative data.”*

This latter demand was also important. The [public consultation](#) launched by the Commission in December 2012 was the first moment non-industry actors engaged with the file, in a marginal (only two groups, the Pirate Party and a French group called Collectif Roosevelt) but meaningful way (75% of individual citizens who took part in it opposed the very principle of issuing new legislation on trade secrets protection).

But it wasn't thanks to DG Internal Market: on the 11th December 2012, it sent the TSIC the link to the public consultation, insisting that this is *“open to all citizens and all sorts of organisation (business organisations, unions, consumers etc.). It would of course be important to have the views of companies from all sizes, sectors and different geographic locations. I would therefore ask you to inform the members of the TSIC [...]”* It then sent a similar email to all the participants in the June conference. Again, proactive outreach to business groups only. The Commission responded to our questions on the complete absence of non-industry groups until the public consultation, and their very limited activity until autumn 2014, by pointing to the fact that it had published numerous documents and communications about its work and that *“these organisations had ample opportunity to engage with its services had they wished to.”*

### **3.3 Lobbying Member States and the European Parliament**

From then on, the main features of the project being more or less settled – pending the finalisation of the economic survey (eventually published in July 2013), the main priority of the “partnership” composed of lobby groups and the small team at the Commission is to ensure that the rest of the Commission supports their proposal, and that there is enough support at the two other EU legislators, the Council (Member States) and the European Parliament.

- On 12th October 2012, the TSIC enquires whether the trade secrets file will be included in the Commission's 2013 work programme in order to have *“a more natural hook with Member States”*. She adds that she is also going to lobby the cabinets of the Enterprise and Research Commissioners. The policy officer answers that he doesn't know yet.

- On the 16th October 2012, IFRA invites Bergevin to participate in a meeting of the SME Intergroup in the European Parliament, dedicated to *“The Need of a Better Protection of Trade Secrets for SMEs”*.

- On 13th November 2012, the same person at TSIC informs the policy officer that she *“had a very good meeting”* with Tajani's cabinet (Commissioner for Enterprise) who is *“entirely supportive of DG Internal Market's action in this area”*.

- On 20th February 2013, IFRA tries a bold move: on the day before a meeting planned earlier, it sends Bergevin a draft directive text, *“a few thoughts in the shape of a legislative draft around innovation and know-how protection”*. The text is structured like a template Commission proposal. Too bold? Bergevin answers that *“for obvious reasons I cannot accept that my team discusses a legislative proposal with industry. For this reason, and given our workload, I prefer at this stage to cancel the meeting that had been set tomorrow.”* (both quotes originally in French)

- On 25th February, IFRA sends DG Internal Market a socio-economic impact analysis of fragrance technologies, which proposes a monetary evaluation of the impact of trade secrets loss. Up to €15bn in GVA and 300,000 jobs would be at risk, it says.

- On 14th March 2013, CEFIC sends *“new documents including facts & figures of interest with regard to trade secrets misappropriation”*.

- On 13th March 2013, in a similar fashion as IFRA and CEFIC, the TSIC sends an email to them to share the results of an *“internal interview exercise”* meant to get data on the cross border and monetary dimension of the issue. This, in the hope that *“this will help you in your current work, ahead of your end of March deadline with regards to the IAB”*.

This is very important: the Impact Assessment Board (IAB) is the internal policy evaluation body of the Commission; in other words, the lobby groups are helping DG Internal Market pass the internal

assessment procedures of the Commission.

- On 24th April 2013, Charles Laroche, consultant for IFRA, wrote to Bergevin to ask him to join a roundtable organised on the issue by the [Kangaroo group](#) and hosted by MEPs Edith Herczog and with the participation of MEP Malcolm Harbour. From then on, the email correspondence between the TSIC and the Commission appears more limited. The TSIC feeds in background readings and articles; receives a notification that the economic survey is being published in July 2013.

## CONCLUSION

On the 28th November 2013, the day the Commission published its legislative proposal, the TSIC, via T. Tindemans, sent the following email to Bergevin and his colleagues:

Subject: *“Congratulations!”*

*“Gentlemen,*

*Allow me to sincerely congratulate you with the adoption of the Commission proposal. There’s a lot of work ahead, but this is a milestone, and your efforts will bear fruit.*

*Regards,*

*Thomas”*