

# SHORT CONSIDERATIONS ON KNOW-HOW IN THE LIGHT OF THE (EU) DIRECTIVE 2016/943

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**Abstract:** *It is not uncommon to acknowledge that a Directive has as a declared purpose to create the legal framework in order to solve the conflict between the quick advance of technology and the rule of Law. It is also the case of the current Directive, which tries to create the premises in order for the member-states to adopt their own legislation so as to protect the valuable information that is perceived as know-how. Considering that the concept has no definition, the aim of this paper is to define the concept of know-how and to distinguish it from the similar notion of trade secret, departing from the already existent doctrine and legal provisions.*

**Key words:** *know-how; trade secret; acknowledgement; permanent evolution; protection.*

## 1. Introduction

The technology is in a continuous evolution, as well as the human society. In the present context, in which the exchanges of information that include the rights of industrial property on some processes and techniques or on the experience accumulated on the basis of the use of certain procedures, these are more and more frequent. Together with it there is an evolution in the methods and in the means of acquiring and using them, and the possibility of unauthorised disclosure of these is also bigger.

Even if this type of knowledge, acknowledged as know-how, has, in principle, secret character, the cases in which this is illegally disclosed are more and more frequent, taking into consideration not only its value at an informational level, but also the value in what concerns the innovation, the strategies of implementing a product on the market or the principles of promotion. Moreover, within know-how there can frequently be found formulas or ways of technical assistance regarding the use or the creation of a certain technology, as well as the way in which this can be exploited and improved based on the experiments and continuous research.

## 2. The Notion of Know-How

In some industrial departments, the creators and the innovators of technology cannot benefit from the exclusive rights on their creations, without us referring to tangible assets

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by the term “creations”. Given the unpatented nature of some types of information or techniques of industrial development or of any other kind, as it is the case of know-how, and starting from the hypothesis that the development and the transmission of these represents a trade secret, they (i.e. the creators) may be victims of illegal use or of some unfair competitive practices, such as parasitic copying or disclosure without right or imitation.

It was aimed to create a unified direction at the level of the national legislations of the E.U. member states by the (EU) Directive 2016/943 regarding the protection of the know-how and of the undisclosed business information (trade secrets) against the acquisition, the use and the illegal disclosure. However, the Directive does not define the notion of know-how, although other terms are defined at the very beginning of it.

The concept of know-how is a concept of the modern law, not being a historically established one. However, the know-how, as a set of technical knowledge, becomes increasingly often the subject of some contracts concluded between professionals, which can generally be named technology transfer contracts, aiming to protect the technique needed to elaborate new products or services that would cover the needs of an increasingly more developed consumer society. Starting from these assumptions, linking the notion of know-how to that of trade secret, as it was done within the Directive regarding the protection of the know-how and of undisclosed business information (trade secrets) against the acquisition, use and illegal disclosure, it is fully justified, in the conditions of ensuring a fair competition on the European free market. Furthermore, most of the times, the notion of know-how is mistaken, at contract level, for that of trade secret, because the two of them have numerous similarities. Regardless of the notion to which the association is made in terms of the protection of the content of a technology or of a typology of use, *„the rights of intellectual property may become the subject of a principle agreement or of a clause in a complex contract, which also implies a technology transfer”* (Macovei, 2009, p. 60).

In what concerns the protection of the intellectual property, we have to say that this *„does not operate automatically; the creator must act in the sense of obtaining the protection - for example, the inventor must make a request to obtain the patent; to obtain the trademark right, the trademark registration must be done”* (Ungureanu, 2015, p. 114). Nevertheless, it has been observed that *„other rights of intellectual property, such as the know-how, are protected by keeping the secret, this making them vulnerable and dependent on respecting the confidentiality”* (Kessedjian, 2013, p. 334).

Generally speaking, know-how is an element of the right to industrial property, a right whose material object is represented by the drawings and the industrial models, the trademarks, the inventions, as well as the related rights necessary for the use of all the above. Starting from the strict sense of the words, the know-how designates those indications, notions or instructions for use which are necessary to the exploitation and the use of a certain type of technology, of a creation, without affecting the non-patrimonial copyrights of the inventor of the respective technology or of the way in which the related information is necessary for the use or for the possible acquisition of a right of industrial property. The know-how may thus be defined as *“a set of unpatentable or patentable technical knowledge (information, experience, ability) but (always) unpatented, necessary to the manufacture, to the functioning or to the marketing of some products or to the elaboration and the functioning of some technologies or procedures”* (Ştefănescu, Căpăţână, 1986, p. 219).

Starting from the quoted definition we can grasp the characteristics of the know-how, namely the technical ability, the experience and the technical knowledge. Related to these, we have to say that all these are “*intellectual elements, that separately or as a whole, compose the content of know-how*” (Ștefănescu, Căpățână, 1986, p. 219). In some cases, however, starting from the material object of the contract between the parties, we also have to bear in mind the procedures.

Regarding the technical ability, its transmission involves the ensuring of the creation of the subject of law which acquires the know-how related to the material object of the contract, but also the transmission of the instructions needed to adapt the equipments or the machineries used in the process of production, so that this acquired knowledge would be useful in relation to the purpose for which they were transmitted.

The experience refers to informing the one who has the quality of acquirer of the know-how of those data, information, carried out or obvious statistics meant to influence a creation or a production process, which had existed before concluding the contract and were made through the following and permanent improvement of the set of technical knowledge based on testing. It should also be mentioned here that the know-how, in point of experience, does not only represent something that has already been tested or implemented, but also something in experimental phase, on the verge of being used or not based on future results.

Finally, the technical knowledge designates all the information needed for the transmitted know-how to suit the aim to which it is meant to be used, in relation to the intellectual creation element that it refers to.

Most of the times, given the nature of the information transmitted either by means of a license contract, or by means of a franchise contract or any other legal operation that involves a transfer, even a temporary one, of the rights of industrial property, and implicitly, of the know-how, the above mentioned elements are inscribed on a material support. It should also be mentioned that the inexistence of the material support (in the situation in which it is transmitted, for example, electronically) does not give the right to breach the obligation of confidentiality which the acquirer has in relation to these data.

Given the fact that the know-how represents a whole set of technical knowledge, this has some technical features, which, in the process of transmission of information on the basis of a contract, differentiates it from its other possible accessories (such as the instruction of use or pre-installation programmes etc.). Thus, these are transmissibility, the secret character, novelty and patentability. In what concerns the transmissibility, this has as a rule an objective character; however, if the know-how is strictly related to the holder, the transmissible character is a relative one and it operates to the extent to which the one who owns it also has the capacity to transmit it, in order to be used with the purpose for which it had been created.

In what concerns the secret character and novelty, it has been shown that “*its value (i.e. of the know-how) consists precisely in the fact that it actually represents a monopoly for its owner, ensured for the interdiction of the access of third parties to that particular knowledge; hence the fragile and aleatory character of the know-how’s value which depends on the extent to which the secret on the comprising knowledge is kept*” (Ștefănescu, Căpățână, 1986, p. 219).

Nevertheless, given the fact that information tends to become one of the most valuable assets that can become the object of a contract, especially in the situation in which it remains secret, creating a (European) title regarding this would not actually be meant to

protect it, but it might also have the negative effect of stopping its evolution or of a rapid obsolescence, a contract regarding this or the recognition of its utility, becoming consequently useless. The unpatentable character consequently presents some positive aspects too, which appeared and have been maintained on the basis of a long commercial practice based on good faith.

The whole set of knowledge that can be considered know-how may be transmitted through an accessory of a main contract (of franchise, for example), or through a complex clause, which comprises both the obligation of confidentiality of the acquirer and the price of the knowledge transmitted in this way. In this regard, it was shown that “*through a technology transfer contract, the holder of a right of intellectual property (...) or of copyright or of unpatented factory secrets or of trade procedures (also acknowledged as know-how, as well as trade secrets or savoir-faire), either gives the permission to another person to use their property in exchange for a price (royalties) for a determined period of time, or transmits the intellectual property itself*” (Fox, 2013, p. 217). There are also actual contracts of know-how, through which “*the provider, the holder of some substantial secret, identified practical technical knowledge, usually unpatented, necessary or useful to the manufacturing process of some goods, to the provision of services or marketing activities of the goods and services, transmits them to the beneficiary, with a view to obtaining royalty*” (Schiau, 2009, p. 521). Nevertheless, the contracts whose purpose is to transmit the know-how usually have an accessory character because the know-how represents a set of knowledge destined to be useful and necessary in a certain process, in the absence of an object of its own, this (i.e. the know-how) would be emptied of its valuable content itself, being unusable.

A distinctive character of the know-how consists of its possibility to be permanently updated; however, keeping the trade secret on the information that was transmitted under the title of know-how, even if this has been modified over the time, remains mandatory, the exchanging of the data or of the manner of use of a certain technique is not likely to release its beneficiary from the initially contracted obligation. Another aspect related to the flexibility of the know-how also implies its continuous improvement, by any of the parts of the contract whose object it is. Furthermore, we may agree that both the licensee and the licensor seem to have the obligation to communicate to the other party the changes made or to improve the aspects that have an insufficient character.

Regarding the part of the contract which transmits the know-how, which, most of the times is done by the franchisor (in the franchise contract) or the licensor (in the license contract) it must be said that this also has the obligation to ensure the assistance throughout the contract, including the manner of use of the transmitted knowledge, the way in which these may be developed and the risks involved by their misuse. Furthermore, the beneficiary “*does not have the right to register any elements from the content of the know-how either in the geographical area stipulated in the contract, or in any other area or state without the written agreement of the franchisor*” (Sitaru, Buglea, Stănescu, 2008, p. 333). However, in the context of the registration, no matter who had done it, the know-how would lose one of its essential elements, namely the secret character, and in this situation, we could not talk about know-how, but only about patented methods to use a certain type of technology.

Starting from the suitability aspect with respect to which know-how represents a value that may be marketed, in some restrictive conditions, it was shown that other types of obligations may also be imposed on the beneficiary, “*as well as a series of restrictive*

*clauses regarding the ways and the conditions to exploit the know-how, the marketing areas of the resulted products, the exclusive supply etc.” (Ștefănescu, Căpățână, 1986, p. 220).*

Finally, considering that in the conditions of the more rapid technological evolution, the knowledge and the methods to exploit the transmitted technique are at least as important as the products or the technology itself; therefore, their protection is more and more important, the legal mechanism of the know-how contract and the international norms to protect it must be more and more present.

### **3. Existing Legal Regulations**

Intellectual property includes products, actions or processes created with a well determined purpose and which, most of the times, offer to their creator a competitive advantage through the element of novelty which they contain. From this point of view, the know-how falls under the subcategory of trade strategies, given its informational value deriving from its secret and unpatented character.

The attempt to find a safe legal frame related to what know-how means, given its secret character, is not a new one, the approach in this regard being a difficult one. Furthermore, it has to be mentioned that the existent norms usually have a suppletive character, resulting in the parts of a possible contract's agreement on certain aspects of its transmission, capitalization and protection, and the penalties for abusively using the know-how are not very various.

An international regulation that we can mention is the Trade Related Aspects on Intellectual Property Rights Agreement, known as T.R.I.P.S., agreement which is a part of the World Trade Organization Agreement (W.T.O.), signed in Marrakesh on the 15th of April 1994 and managed by the latter [mention should be made of the fact that there is an Agreement signed on the 22nd of December 1995 between W.T.O. and W.I.P.O (World Intellectual Property Organization – a specialised agency which functions inside the U.N.O) targeting the collaboration between the two institutions in order to apply the T.R.I.P.S.]. According to art. 39 of T.R.I.P.S., related to the protection of undisclosed information, it is stipulated that *“individuals or companies will have the possibility to prevent the information that is illicitly under their control from not being disclosed to the third parties, or acquired or used by them without their consent and in a manner contrary to honest commercial practices, provided that the information: is secret in the sense that, in its whole or in the configuration or the exact assembly of the elements, it would generally not be known by persons belonging to the structures normally dealing with the information concerned or it would not be easily accessible; has a commercial value by being secret; and has been the subject of some reasonable provisions, depending on the circumstances, destined to keep it secret, on behalf of the person who licitly controls it”*.

Moreover, regarding the concrete protection of such information which cumulatively meets the three conditions shown above, in art. 40, paragraph 1, thesis 1 of the same international normative act, it is shown that *“The members will ensure that their legislation would contain procedures meant to ensure the protection of the rights of intellectual property like the ones stated in this part in a manner that would allow an effective action against any act that would prejudice the rights on intellectual property covered by the Agreement, including fast corrective actions that would represent a deterrent against any subsequent action”*. As it can be observed, the quoted norm does

not contain concrete examples or limits within which it should be taken into consideration the enactment of the protection of know-how, the regulation thus having a general and broad character.

However, it should be noted that the notion of know-how is not internationally seen in a very different way from the doctrine's vision presented in the previous section, an aspect that would prevent the regulation on its protection from meeting uncommon difficulties.

Taking into consideration the commercial character of the know-how, in terms of soft law norms, we also have to mention the Model International Franchising Contract elaborated by the Chamber of Commerce and Industry, a model that has "*the advantage of representing a synthesis of the commercial practice in the field*" (Sitaru, Buglea, Stănescu, 2008, p. 333). Although, within this model we do not find a practical way to protect what the know-how implies, in art. 2, point. 52 of the Model it is stated that this is a "*fundamental element of the franchise system; the term designates the knowledge and experience acquired by the franchisor related to the subject of the franchise contract*". The model does not contain any other provisions related to the features of the know-how or to its protection, as there is only a general obligation to keep the secret on the information transmitted through the contract.

Taking into consideration that both regulations refer to the protection of the know-how once a contract had been signed, regardless of its kind, in practice, there is also the prerequisite of keeping it secret during contract negotiations, because in the process of formation and adaptation of the clauses, it is not forbidden to the parties to discuss the content of the know-how. Starting from this premise, there may be taken into consideration the UNIDROIT 2010 Principles regarding international trade contracts, such as art. 2.1.16., thesis I according to which "*if in the negotiation phase, a party communicates to the other party a piece of confidential information, the latter is obliged, no matter if the contract is going to be signed or not, not to disclose that particular information or not to use it inappropriately in order to satisfy its own interests*".

In principle, if the information mutually transmitted during the negotiation is not conventionally designated as being confidential, there is no obligation related to considering it secret, even if it meets the content elements of what know-how means, because by reference to the moment in which it comes into discussion there is no contract yet. However, "*if they (i.e. a party) expressly declare that the delivered information must be considered confidential, it is clear that, by receiving the information, the other party implicitly accepted to consider it confidential*" (Bobei, 2015, p. 65), in the case of not respecting the obligation, being forced to compensate for the damage of its disclosure. The obligation is actually one of a general character, referring to any type of information deemed confidential; even if the know-how may be included in what is negotiated, we appreciate that the dispositions referring to keeping a secret on this should be established by the parties. In addition, "*the non-disclosure obligation, even if it is does not have a time limit, it can only activate within the period in which it displays an economic value*" (Almăşan, 2013, p. 242).

At European level, the definition of the notion of know-how can be found in the (E.U.) Regulation no. 330/2010 regarding the application of the article 101 paragraph (3) from the Treaty on the Functioning of the European Union on categories of vertical agreements and concerted practices; thus, according to art. I, paragraph (1), letter g), the know-how "*represents an identified substantial, secret set of unpatented practical information resulted from the provider's experience and tested by himself/herself: in this context,*

*secret means that the know-how is not generally known or easily accessible; substantial means that this know-how is significant and useful to the buyer for the use, sale or resale of the goods or the contractual services; identified means that the know-how is described in a manner comprising enough to allow the checking of the conditions of secret and substantial*". Unlike the T.R.I.P.S. Agreement, the Regulation also defines what each of the essential characteristics of know-how mean.

However, within this normative act there are not any expressly stipulated restrictions or protection measures for it, these being left to the choice of the parties to an agreement or of a contract; the existent norms with restrictive character refer to certain temporal interdictions or to the fact that the parties' right to establish certain restrictions or sanctions regarding the knowledge that will be transferred is recognised.

At an internal level, there are more normative acts in which the term of know-how appears; however, there are few norms referring to its protection or they have a general character, depending on the normative act within which the respective norms could be found.

A first regulation that we can mention in this sense is Law no. 11/1991 related to combating unfair competition; within it there is no establishment of the term of know-how, but we could find a similar notion, "*that of trade secret, whose origin is in the Trade Related Aspects on Intellectual Property Rights Agreement (T.R.I.P.S.)*" (Ungureanu, 2015, p. 120). According to art. 1, paragraph (1), letter d) of the above mentioned law, the trade secret refers to "any kind of information that, totally or partially, is not generally known or is not easily accessible to the persons from the environment in which this kind of information is usually dealt with and which acquires a commercial value by the fact that it is secret, for which the legitimate owner has taken reasonable measures according to the circumstances, for its secret character to be preserved; the protection of the trade secret operates as long as the previously mentioned aspects are cumulatively accomplished". As it can be observed, even though prior to the European Regulation no. 330/2010, the legal definition refers to all the identification elements of the information which have to exist cumulatively so that this could be identified as being a part of the category of what know-how means.

Another regulation on what know-how means can be found in the Government Decision no. 52/1997 regarding the legal status of the franchise, republished, where in art. 1, paragraph (1), letter d) it is specified that the "*know-how is the set of formulas, technical definitions, documents, drawings and models, networks, procedures and other similar items, which are good for the fabrication and the marketing of a product*". Although this legal definition is more technical reuniting all that might be included in the know-how, here it is not mentioned the secret character of the information transmitted through the contract. Furthermore, it does not refer to its commercial value either, a value which we consider that it might be implied, given the fact that the know-how is defined as a (possible) part of the material object of the franchise contract. As such, there is no protection norm for the know-how.

The most recent regulation on the notion of know-how is the one from art. 7, point 17 of the Law 227/2015 regarding the Tax Code, republished, where this was defined as being "*the set of formulas, technical definitions, documents, drawings and models, networks, procedures and of other similar elements, which are good for the fabrication and the marketing of a product*", a definition which, as we can observe, lacks the secret character of the information, but also its value.

#### 4. The Delimitation of the Notion of the Know-How and that of Trade Secret

As we could see, the recent Directive elaborated by the European Parliament and the Council refers both to the know-how and the trade secret, the term secret being assimilated to undisclosed business information. The relationship between the two concepts started from the T.R.I.P.S. Agreement which was approved by the majority of the European Union member states and within which reference is made to trade secrets in order to distinguish both the know-how and undisclosed business information.

In this context, we must point out certain aspects: generally and theoretically, intellectual property can be divided into three subcategories, such as the one of industrial property, including the inventions (patents), trademarks, industrial drawings, new varieties of plants and indications of geographical origin; the one of the works of art protected by copyright, including original works of literature and art, music, radio and television programmes, software, databases, architectural projects, advertising and multimedia creations and the one of the trade strategies, containing trade secrets, know-how, confidentiality agreements, fast production. Starting from these premises, hence from the relationship between the concept of know-how and that of trade secret, the subject of the Directive is formed of the two components that characterize trade strategy.

Furthermore, the European legislator has taken into consideration the fact that the enterprises consider that trade secrets are as important as patents and other forms of intellectual property and that an important instrument to manage competitiveness in the business environment is confidentiality, because the latter can operate in a wider frame, which comprises a more varied range of information.

*Stricto sensu*, the know-how is an intangible technological asset. The trade secret may be defined as “a set of measures taken by each participant in the (external) economical changes, with the purpose of keeping and not to disclosing data and information referring to the operations performed, the actions taken, the contracts in the process of registration and future programmes” (Ştefănescu, Căpăţână, 1986, p. 324). Within the Directive, in paragraph (1), the last thesis of the Explanatory Memorandum it is stipulated that “the know-how and the valuable undisclosed business information which are destined to remain confidential are called trade secrets”. Consequently, we must observe that the notion of know-how becomes subsequent to the one of trade secret, although the two of them are two different concepts, part and parcel of what trade strategy means, this representing a set of operations within which specific means and methods are used in order to ensure the success in a certain activity; thus, based on a strategy, the entire structure is created and meant to be followed during a certain process, during which information with a certain value and which may offer a certain competitive advantage is exchanged. Furthermore, in art. 2, point 1 of the Directive the trade secret is defined, being stipulated that “trade secret means the information which meets the following requirements: (a) it is secret in the sense that it is not as a whole or in the way in which it presents itself or its elements articulate, generally known or easily accessible to the persons from the circles which normally deal with the information concerned; (b) it has a trade value by the fact that it is secret; (c) it has been the subject of some reasonable measures, in the given circumstances, taken by the person legally in control of the respective information, to be kept secret”.

In this context, there is no difference between trade secret and know-how. What implies the latter is not even mentioned in the notion of trade secret and which, in its turn, is the

subject of this Directive. However, we consider that the distinction between the two of them, in order to provide an optimal protection is necessary, because although they are part of the same subcategory of the rights of intellectual property and have a value by their secret character and, most of the times, unpatented, these do not have an identical content. The know-how has a technological content, which refers to the modalities of use of a certain type of technology and has a subsidiary character with respect to the main material object of a contract of technology transfer, of franchise etc. The trade secret, in exchange, regards the whole trade activity, production strategies, negotiation techniques, data and information regarding the whole set of operations.

So, although the distinction is not taken into consideration and it is not maintained at supranational level, it continues to exist. We have to mention that it is necessary that the member states should reach relatively similar legal dispositions regarding both concepts (i.e. know-how and trade secret), given the fact that the distinction between these has mostly been operated among professionals, and keeping it at the level of good trade practice would circumvent the purpose of the directive itself, although it would be in the spirit of what secret means in the trade activity or knowledge exchange.

However, it was recorded that *“it is appropriate to lay down the rules at the level of the Union to bring together the documents with the power of law and the administrative documents of the member states, in order to ensure a sufficient and comparable level of repairs in front of the civil courts on the internal market in the case of the acquisition, the use or the illegal disclosure of a trade secret. The respective norms should not prejudice the possibility of the member states to provide a more comprehensive protection against the acquisition, the use or the illegal disclosure of trade secrets, on condition that the guarantees explicitly stipulated in this directive to protect the interests of other parties should be respected”* (Paragraph 10 from the Explanatory Memorandum of the (EU) Directive 2016/943).

## 5. Conclusions

As we could see, both the supranational regulations and the national ones have a relatively unified view on what concerns the know-how concept. Nevertheless, although the know-how is limited by other notions, there are no norms regarding its protection. Given the fact that this has got, in principle, a secret character, the regulation of its protection would be difficult enough, taking into consideration that it should be ensured that reputed knowledge is protected by legal norms and not just based on the confidentiality obligation stipulated in the contracts. However, the protection of the knowledge associated to a product or service is necessary to ensure good business practices.

The adoption of the (EU) Directive 2016/943 whose main subject is the protection of know-how and of the trade secret is based on art. 118, paragraph 1 of the Treaty of the European Union where it is stipulated that *“within the founding or the functioning of the internal market, the European Parliament and the Council, deciding according to the ordinary legislative procedure, establish the measures referring to the creation of European titles of intellectual property to ensure a uniform protection of the rights of intellectual property within the Union, as well as the founding of some centralized systems of authorisation, coordination and control at the level of the Union”* (We mention that this article does not have a correspondent in the European Community

Treaty and it was introduced in the European Union Treaty only after the adoption of the Treaty of Lisbon). Nevertheless, being a directive, we have to mention that this is a resulting norm, because “*the directive requires results and leaves to the recipients the competence to reach them before the deadlines*” (Fuerea, 2016, p. 47). The transposition is about to take place based on an internal procedure according to which the competent authorities of each member state “*identify those norms through which the provisions of a directive are implemented, in the sense of an in-line conduct*” (Fuerea, 2016, p. 48). At national level, it is the Romanian legislator’s duty to find the modality to transpose and to adapt the measures stipulated in the Directive to the social reality.

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