

Übersetzung durch Eileen Flügel

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Act on the Protection of Trade Secrets

(Gesetz zum Schutz von Geschäftsgeheimnissen – GeschGehG)

Act on the Protection of Trade Secrets of 18 April 2019 (Federal Law Gazette I, p. 466)

Division 1

General provisions

Section 1

Scope

- (1) This Act serves to protect trade secrets against their unauthorised acquisition, use and disclosure.
- (2) Public-law requirements on the confidentiality, acquisition, use or disclosure of trade secrets take precedence.
- (3) The following remain unaffected:
 1. the protection under occupational and criminal law of trade secrets, unlawful disclosure of which is covered by section 203 of the German Criminal Code (*Strafgesetzbuch*),
 2. the exercise of the right to freedom of expression and information under the Charter of Fundamental Rights of the European Union (OJ C 202 of 7.6.2016, p. 389), including respect for the freedom and pluralism of the media,
 3. the autonomy of the social partners and their right to enter into collective agreements in accordance with existing European and national laws,
 4. the rights and obligations deriving from employment relationships and the rights of workers' representatives.

Section 2

Definitions

For the purposes of this Act,

1. 'trade secret' means
information
 - a) that is not, as a whole or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question and is thus of economic value and

- b) that has been subject to reasonable steps under the circumstances, by its lawful holder, to maintain secrecy and
- c) concerning which there is a legitimate interest in maintaining secrecy;
- 2. 'trade secret holder' means
any natural or legal person lawfully controlling a trade secret;
- 3. 'infringer' means
any natural or legal person who unlawfully acquires, uses or discloses a trade secret, in breach of section 4; a person who is able to invoke an exception under section 5 is not an infringer;
- 4. 'infringing good' means
a good the design, characteristics, functioning, production process or marketing of which significantly benefits from a trade secret unlawfully gained, used or disclosed.

Section 3

Permissible acts

- (1) A trade secret may, in particular, be acquired by
- 1. independent discovery or creation;
 - 2. observation, study, disassembly or testing of a good or object that
 - a) has been made available to the public or
 - b) that is lawfully in the possession of the observer, investigator, disassembler or tester and this person is free from any duty to limit the acquisition of the trade secret;
 - 3. exercise of the rights of workers to information and consultation or the rights of workers' representatives to participation and codetermination.
- (2) A trade secret may be acquired, used or disclosed if this is permitted by law, by virtue of a law or by transaction.

Section 4

Prohibited actions

- (1) A trade secret may not be acquired by
- 1. unauthorised access to, appropriation of, or copying of any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced; or
 - 2. any other conduct which, under the circumstances, is not commensurate with the principle of good faith in consideration of honest market practices.
- (2) A person who has acquired a trade secret may not use or disclose it if
- 1. he or she acquired the trade secret by means of their own act under subsection (1)
 - a) no. 1 or
 - b) no. 2;
 - 2. he or she is in breach of a duty to limit the use of the trade secret or

3. he or she is in breach of a duty not to disclose the trade secret.

(3) A person who has acquired the trade secret through a third party and, at the time of the acquisition, use or disclosure knows or ought to know that the third party has used or disclosed the trade secret in breach of subsection (2), may not acquire, use or disclose the trade secret. That applies in particular when the use consists of the production, offering, placing on the market or the importation, export or storage of infringing goods for those purposes.

Section 5 Exceptions

The acquisition, use or disclosure of a trade secret does not fall under the prohibitions of section 4 if this takes place in order to protect a legitimate interest, in particular

1. for exercising the right to freedom of expression and information, including respect for the freedom and pluralism of the media;
2. for revealing misconduct or wrongdoing if the purpose of the acquisition, use or disclosure is directed at protecting the general public interest;
3. in the context of disclosure by workers to their representatives if this is necessary for the workers' representatives to exercise their functions.

Division 2 Claims in case of legal infringements

Section 6 Elimination and injunctive relief

The trade secret holder is entitled to demand from the infringer the removal of the infringement and, in the event of the risk of recurrence, also injunctive relief. The right to injunctive relief also exists when the risk of legal infringement exists for the first time.

Section 7 Destruction; delivery up; recall; removal and withdrawal from the market

The trade secret holder is also entitled to demand from the infringer

1. destruction or delivery up of the documents, objects, materials, substances or electronic files in the possession or ownership of the infringer, containing or representing the trade secret,
2. recall of the infringing good,
3. permanent removal of the infringing goods from sales channels,
4. destruction of the infringing goods or
5. withdrawal from the market of the infringing goods if the protection of the trade secret is not thereby infringed.

Section 8 Information on infringing goods; damages for infringement of the duty to provide information

(1) The trade secret holder may demand information from the infringer on the following:

1. name and address of manufacturers, suppliers and other previous possessors of the infringing goods and the commercial consumers and sales outlets for which they were intended,
2. the quantity of the infringing goods manufactured, ordered, supplied or received and the sales prices,

3. the documents, objects, materials, substances or electronic files in the possession or ownership of the infringer, containing or representing the trade secret and

4. the person from whom he or she obtained the trade secret and to whom he or she has disclosed it.

(2) If the infringer, intentionally or due to gross negligence, does not provide the information or provides it late, incorrectly or incompletely, he or she has an obligation to compensate the trade secret holder for the resulting damage.

Section 9

Exclusion of claims in case of disproportionality

The claims under sections 6 to 8 (1) are excluded if the fulfilment would be disproportionate in the individual case, taking into account in particular

1. the value or another specific characteristic of the trade secret,
2. the steps taken to maintain secrecy,
3. the infringer's conduct when acquiring, using or disclosing the trade secret,
4. the consequences of the unlawful use or disclosure of the trade secret,
5. the legitimate interests of the trade secret holder and of the infringer and the effects that the fulfilment of the claims could have for both,
6. the legitimate interests of third parties or
7. the public interest.

Section 10

Liability of the infringer

(1) An infringer who acts intentionally or negligently is liable to pay damages to the trade secret holder for any harm arising from the infringement. Section 619a of the German Civil Code (*Bürgerliches Gesetzbuch*) remains unaffected.

(2) The profit made by the infringer as a result of the infringement may be taken into account when assessing the damages. The claim to damages may also be determined on the basis of the amount that the infringer would have had to pay in appropriate remuneration if he or she had obtained consent to acquire, use or disclose the trade secret.

(3) The trade secret holder may also demand financial compensation from the infringer for damage that is not of a pecuniary nature if it is equitable.

Section 11

Pecuniary compensation

(1) An infringer who has acted neither intentionally nor negligently may make pecuniary compensation to the trade secret holder to avoid the claims under sections 6 or 7 if, by fulfilling the claims, the infringer would suffer a disproportionately great disadvantage and if pecuniary compensation appears appropriate.

(2) The amount of the pecuniary compensation is assessed in accordance with the remuneration that would be appropriate when granting contractual right of use. It may not exceed the amount corresponding to remuneration within the meaning of sentence 1 for the length of time during which the trade secret holder has a right to injunctive relief.

Section 12

Liability of business owners

If the infringer is an employee or representative of a business, the trade secret holder also has claims against the owner of the business under sections 6 to 8. This only applies to the claim under section 8 (2) if the owner of the business, intentionally or due to gross

negligence, did not provide the information at all or in time or provided it incorrectly or incompletely.

Section 13

Claim to surrender after limitation occurs

If the infringer acquired, disclosed or used a trade secret intentionally or negligently and, as a result of this breach of a trade secret, obtains something at the expense of the trade secret holder, he or she is obliged under section 10 to surrender any unjust enrichment under the provisions of the German Civil Code, even after the occurrence of limitation of the claim to damages. This claim become time-barred six years after it occurred.

Section 14

Prohibition of abuse

The assertion of rights under this Act is inadmissible if, in consideration of all the circumstances, it is abusive. In case of abusive assertion of rights, the defendant may claim the reimbursement of the necessary expenses incurred for his or her legal defence. Rights to reimbursement over and above this remain unaffected.

Division 3

Proceedings in trade secret disputes

Section 15

Substantive and local jurisdiction; authorisation to issue statutory instruments

- (1) The regional courts have exclusive jurisdiction for actions before the ordinary courts through which claims are asserted under this Act, regardless of the value of the claim.
- (2) The court within the district of which the defendant has his or her general venue has exclusive jurisdiction for actions under subsection (1). If the defendant does not have a venue within Germany, only the court within the district of which the act was committed has jurisdiction.
- (3) The *Land* governments are authorised by statutory instrument to assign the actions under subsection (1) of the districts of several regional courts to one regional court. The *Land* governments may transfer this authorisation by statutory instrument to the *Land* departments of justice. In addition, the *Länder* may, by agreement, transfer the actions incumbent on the courts of one *Land* under subsection (1) to the competent court of another *Land*, in full or in part.

Section 16

Confidentiality

- (1) In actions by means of which claims are asserted under this Act (trade secret disputes) the court dealing with the main proceedings may, upon the application of a party, categorise information that is the subject of proceedings as sensitive, in full or in part, if it may be a trade secret.
- (2) The parties, their counsel, witnesses, experts, other representatives any other persons involved in trade secret disputes or who have access to documents of such proceedings, must treat confidentially information categorised as sensitive and may not use or disclose it outside court proceedings unless they became aware of it outside the proceedings.
- (3) If the court takes a decision under subsection (1), third parties that have a right to inspect the files may only be provided with the contents of files in which statements containing trade secrets have been made illegible.

Section 17

Administrative measures

The court dealing with the main proceedings may, upon application by a party, impose a coercive fine of up to 100,000 euro or coercive detention for up to six months and execute it immediately for breaches of the duties under section 16 (2). At the same time as imposing a

coercive fine, it is to be determined to what extent the fine is to be replaced by coercive detention if the fine cannot be collected. A complaint against the administrative measure imposed under sentence 1 has a suspensive effect.

Section 18

Confidentiality after the termination of the proceedings

The duties under section 16 (2) continue to exist after the termination of the judicial proceedings. This does not apply if the court dealing with the main proceedings has denied the existence of the trade secret that is the subject of proceedings by a judgment that has become final and binding or as soon as the information that is the subject of proceedings becomes generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question

Section 19

Other judicial limitations

(1) In addition to section 16 (1), the court dealing with the main proceedings, upon application by a party, limits access, in full or in part, to a certain number of reliable persons, in order to safeguard trade secrets

1. to documents submitted or presented by the parties or third parties that may contain trade secrets, or
2. to the hearing at which trade secrets could be disclosed, and to the recording or minutes of the hearing.

That applies only to the extent that, after consideration of all circumstances, the interest in maintaining secrecy overrides the participants' right to be heard, also taking into consideration their right to effective legal redress and fair proceedings. Access is to be granted to at least one natural person of each party and their counsels or other representatives. In all other cases, the court determines at its own discretion which orders are necessary to achieve the objective.

(2) If the court imposes limits under subsection (1) sentence 1,

1. the general public may be excluded from the hearing upon application and
2. section 16 (3) does not apply to admitted persons.

(3) Sections 16 to 19 (1) and (2) apply accordingly in compulsory enforcement proceedings if the court dealing with the main proceedings has classified Information under section 16 (1) as sensitive or has imposed additional limitations under subsection (1) sentence 1.

Section 20

Proceedings in the case of measures under sections 16 to 19

(1) The court dealing with the main proceedings may order a limitation under section 16 (1) and section 19 (1) when a court dispute is pending.

(2) The other party is to be heard by the court no later than after the measure has been ordered. The court may suspend or amend the measure after hearing the parties.

(3) The party submitting the application under section 16 (1) or section 19 (1) must credibly demonstrate that the information that is the subject of the proceedings is a trade secret.

(4) If papers and other documents are handed in or submitted with the application or following an order in accordance with section 16 (1) or an order in accordance with section 19 (1) sentence 1 no. 1, the party making the application must indicate the statements which, in its opinion, contain trade secrets. In the case of section 19 (1) sentence 1 no. 1, it must also submit a version that may be inspected without divulging trade secrets. If no such version, where the trade secrets have been made illegible, is submitted, the court may assume consent to inspection unless the court is aware of special circumstances that do not justify such an assumption.

(5) The court decides on the application by decree. If it grants the application, it must draw the attention of the participants to the effect of the decree under section 16 (2) and section 18 and consequences of a breach under section 17. If the court intends to dismiss the application, it is to draw the applicant party's attention to this and to the reasons for it and to give it an opportunity to make a statement within a period to be determined. Categorisation as sensitive in accordance with section 16 (1) and an order of limitation in accordance with section 19 (1) may only be contested together, with the appellate remedy in the main proceedings. In all other cases, an immediate complaint may be filed.

(6) The court dealing with the main proceedings within the meaning of this Division is

1. the court of first instance or
2. the appeal court if the main proceedings are pending with the appellate instance on fact and law.

Section 21

Announcement of the judgment

(1) The party that has prevailed in a trade secret dispute may, upon application, be given authority in the operative provisions of the judgment to publicly announce the judgment or information about the judgment at the cost of the party that has not prevailed if the party that has prevailed demonstrates a legitimate interest in so doing. The form and extent of the public announcement are determined in the operative provisions of the judgment, taking into account the legitimate interests of the persons specified in the judgment.

(2) In decisions on public announcement under subsection (1) sentence 1, the following, in particular, is to be taken into account:

1. the value of the trade secret,
2. the infringer's conduct when acquiring, using or disclosing the trade secret,
3. the consequences of the unlawful use or disclosure of the trade secret and
4. the likelihood of a further unlawful use or disclosure of the trade secret by the infringer.

(3) The judgment may only be announced upon the judgment having become final unless the court determines otherwise.

Section 22

Reduction of the value in dispute

(1) If, in the context of trade secret disputes, a party credibly demonstrates that its economic situation would be seriously jeopardised if it had to bear the costs of litigation calculated on the basis of the full value in dispute, the court may, upon such party's application, order that the obligation of this party to pay the court fees be assessed on the basis of a part of the value in dispute adjusted to its economic situation.

(2) The order under subsection (1) also has the following consequences:

1. the benefiting party also has to pay its lawyer's fees only on the basis of the adjusted part of the value in dispute,
2. where costs of litigation are imposed upon or assumed by the benefiting party, this party is to reimburse the opposing party for paid court fees and the fees of its lawyer only on the basis of the adjusted value in dispute and
3. where the extra-judicial costs are imposed upon or assumed by the opposing party, the lawyer of the benefiting party may recover his or her fees from the opposing party based on the value in dispute applying to the opposing party.

(3) The application under subsection (1) is to be made prior to the hearing of the case on its merits. The application is subsequently admissible only if the assumed or specified value in

dispute is increased by the court. The application may be declared before and recorded with the registry of the court. The opposing party is to be heard prior to the decision on the application.

Division 4 Criminal law provisions

Section 23 Breach of trade secrets

(1) A prison sentence of up to three years or a fine is imposed on anyone who, to foster their own competition or that of a third party, or for their own benefit, for the benefit of a third party or with the intention of damaging a business owner,

1. acquires a trade secret in breach of section 4 (1) no. 1,
2. uses or discloses a trade secret in breach of section 4 (2) no. 1 letter (a) or
3. as a person employed in a business, discloses a trade secret with which he or she was entrusted or to which he or she had access within the framework of the employment relationship during the period of validity of the employment relationship, in breach of section 4 (2) no. 3,

(2) A sentence is also imposed on anyone who, to foster their own competition or that of a third party, or for their own benefit, for the benefit of a third party or with the intention of damaging a business owner, uses or discloses a trade secret that he or she has obtained through the action of a third party under subsection (1) no. 2 or no. 3.

(3) A prison sentence of up to two years or a fine is imposed on anyone who, to foster their own competition or that of a third party or for their own benefit, uses or discloses a trade secret comprising a secret model or an instruction of a technical nature entrusted to him or her in the course of trade, in breach of section 4 (2) no. 2 or no. 3.

(4) A prison sentence of up to five years or a fine is imposed on anyone who

1. acts on a commercial basis in the cases under subsections (1) or (2),
2. knows at the time of disclosure in the cases under subsection (1) no. 2 or no. 3 or subsection (2) that the trade secret is to be used abroad, or
3. uses the trade secret abroad in the cases under subsection (1) no. 2 or subsection (2).

(5) Attempted perpetration is punishable.

(6) Acts of aiding by one of those persons referred to in section 53 (1) sentence 1 no. 5 of the Code of Criminal Procedure (*Strafprozessordnung*) are not deemed unlawful if they are restricted to the receipt, analysis or publication of the trade secret.

(7) Section 5 no. 7 of the German Criminal Code applies accordingly. Sections 30 and 31 of the German Criminal Code apply accordingly if the perpetrator acts to foster their own competition or that of a third party, or for their own benefit.

(8) The offence is prosecuted only upon application unless the prosecuting authority deems there to be a special public interest in prosecution which calls for ex officio intervention.