

Q&A: enforcement proceedings for trade secrets in Germany

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Germany | October 2 2025

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Enforcement proceedings

Causes of action

What causes of action are available and commonly asserted against misappropriation and unauthorised disclosure of trade secrets in your jurisdiction?

The Trade Secret Act (GeschGehG) provides for a whole range of statutory claims in the case of misappropriation or unauthorised disclosure of trade secrets, such as injunction, destruction or release of the documents, items, materials, substances or electronic files, recall or permanent removal or destruction of infringing products, information claims and claims for damages.

In the case of claims for damages, in the assessment of damages, the profit that the infringer has made from the infringement of the right may also be taken into account. Further, the claim for damages may be based on the amount that the infringer would have had to pay as appropriate remuneration if he or she had obtained consent to obtain, use or disclose the trade secret.

If the violation of trade secrets results from the breach of a confidentiality agreement, there may be contractual claims on which the claims can also be - and are typically - based.

Court jurisdiction

What criteria are used to establish the courts' jurisdiction over trade secret disputes? Are there any specialist courts for the resolution of trade secret disputes?

In Germany, where the defendant is domiciled in Germany (natural persons) or has its seat of establishment in Germany (legal entities) the regional court in whose district the defendant has his or her general place of jurisdiction has exclusive jurisdiction in the first instance for actions before the ordinary courts. In the case of trade secret disputes against current or former employees that are connected to the employment relationship, labour courts have exclusive jurisdiction.

The federal states are empowered to assign jurisdiction to one regional court by decree for the districts of several regional courts to establish specialist courts for the resolution of trade secret disputes. Such courts have already been established in some states.

Internationally, if the defendant is domiciled or established outside of Germany, the German court will establish its international jurisdiction under Regulation (EU) No. 1215/2012 of 12 December 2012. Concerning delicts or quasi-delicts, section 2 thereof establishes that a person or entity domiciled in another member state may be sued

at the place where the harmful event occurred or may occur. If this place is in Germany, section 15(2) of the GeschGehG establishes exclusive jurisdiction, at the place where the tortious act is being committed. EU and German law allow a choice of forum clauses for establishing jurisdiction.

Procedural considerations

What is the typical format and timetable of proceedings?

Regarding interlocutory injunctions, a decision may usually be obtained within a couple of days from filing the request for ex parte relief. However, owing to a recent change of federal case law, the court may decide to grant an interlocutory injunction only after having heard the other party within short periods. This may result in a duration of up to two or three months until a decision is made. If an ex parte injunction is issued and the respondent objects, one can expect an oral hearing within a time frame of two months. If the other party was heard and the decision on interlocutory relief is rendered by way of a judgment, a decision by the court of appeal may be expected within six to 12 months. Given that the German court system up to the appeal stage is organised on the level of the German states, there are notable differences concerning court practice and duration of the proceedings.

For the main proceedings, one may expect a first instance decision within 12 months and a decision upon appeal within six to eight months.

However, owing to the federal structure of the German court system and the heterogeneity among the competent courts there may be substantial differences regarding duration. The main factor having an impact on duration is probably the complexity of the facts. Factually complex technical trade secret misappropriation cases may have a considerably longer duration, especially if there is a need for the court to appoint an expert and to hear numerous witnesses of the fact.

Limitation periods

What limitation periods apply for trade secret misappropriation claims?

The limitation period for trade secret misappropriation claims is typically three years beginning at the end of the year in which the claim has arisen and the claimant has become or should have become aware of the circumstances giving rise to the claim, but not longer than 10 years from arising of the claim.

Under certain circumstances, the limitation period for claims to surrender unjustifiably obtained advantages is six years after its accrual.

Secondary liability

To what extent can someone be liable for inducing or contributing to trade secret misappropriation? Can multiple parties be joined as defendants in the same suit?

Any natural or legal person who unlawfully acquires, uses or discloses a trade secret is liable. This may also include employees and representatives of a company. Further, instigators and assistants of the infringers can be liable under certain circumstances. If there is no jurisdiction of different courts, multiple parties can be joined as defendants in the same suit if they are entitled or obliged for the same factual and legal reason.

Obtaining and preserving evidence

What mechanisms are available to obtain and preserve evidence from defendants and third parties in trade secret litigation?

The violation of trade secrets is a criminal offence under certain conditions. If there is sufficient suspicion of a crime, the criminal prosecution authorities can investigate and secure evidence through a criminal complaint. Simply, the owner of the trade secrets then has a legitimate interest in inspecting the files and thus access to the evidence.

If there is a certain probability of misappropriation of trade secrets, the owner of the trade secrets may also have an inspection right, such as by having an expert who is commissioned by the court to inspect and assess an object that may have been manufactured using unlawfully obtained trade secrets.

Further, the court may order a party or a third party to produce deeds or other documents in his or her possession to which a party has referred. However, in this case, it must be possible to specify the document to be produced.

Expert evidence

What rules and standards govern the admissibility of expert evidence?

Expert evidence is ordered either ex officio or upon party application in court proceedings, if there is a lack of expertise of the court. In such cases, an expert opinion submitted by a party does not substitute expert evidence ordered by the court. Party-appointed expert reports are essentially treated as party submissions and not as compelling means of proof.

Confidentiality during litigation

What measures may the court and litigants take to protect trade secrets during litigation?

The court may, at the request of one of the parties, classify information as confidential information, if that information may be a trade secret. The requesting party must identify the trade secrets (in the case of documents, it additionally submits a censored version without disclosure of trade secrets) and show credibly that the information is a trade secret (the requirements for credibility are not too high). The parties, their attorneys, witnesses, experts, other representatives and all other persons involved in trade secret litigation or having access to documents of such litigation have to keep confidential information classified as confidential and shall not use or disclose such information outside of judicial proceedings unless they have obtained knowledge of it outside of such proceedings.

At the request of the party, the court may also restrict access in whole or in part to a certain number of reliable persons to documents submitted or presented, or to the oral proceedings.

Defences

What defences are available and commonly asserted against trade secret misappropriation claims?

Common defences in civil proceedings are:

- the asserted trade secrets of the claimant are not being used;
- the asserted trade secrets of the claimant do not fulfil the statutory requirements for being qualified as such under the GeschGehG (eg, because they are in the public domain);
- the asserted trade secrets of the claimant were not misappropriated because they were obtained by independent efforts of the respondent or lawfully from a third source;
- procedurally, the inadmissibility of the prayers for relief (eg, the cease-and-desist claim) for being too broad or too vague;
- concerning damage claims, contestation of the facts on which the damage claims are being based and quantified; and
- that the statutory claims under the GeschGehG are excluded because their fulfilment would be disproportionate in the individual case, taking into account, in particular, the value or other specific feature of a trade secret, the confidentiality measures taken, conduct of the infringer in obtaining, using or disclosing the trade secret, the consequences of unlawful use or disclosure of a trade secret, and the legitimate interests of the owner of a trade secret and the infringer, as well as the consequences that the fulfilment of the claims may have for both of them, the legitimate interests of third parties, or public interest.

Appeal

What avenues of appeal are available following an adverse decision in a civil suit? Is new evidence allowed at the appeal stage?

An ex parte interlocutory injunction in the form of a court order is appealed by a filed opposition and is decided by the first instance court that issued the order. The decision on the opposition is rendered as a judgment and may be appealed. First instance judgments issued may be appealed.

To be admissible, new factual assertions and evidence must be filed as early as possible in the appeal proceedings together with an explanation why they could not be introduced during the first instance. The grounds of admission are stated in the German Code of Civil Procedure. In interlocutory injunction proceedings, new evidence is allowed at the appeal stage without restriction, provided that the late submission is not regarded as a lack of urgency.

Costs

What is the typical cost range of a trade secret misappropriation suit? Can a successful litigant recover costs and attorneys' fees?

There is no 'normal' cost range. Court fees and recoverable attorney fees are determined based on the value at stake, which varies depending on the economic importance of the matter for the claimant. The claimant must provide an estimate of the amount in dispute and the court will fix the amount based on the information on file. Since in trade secret misappropriation cases part of the claims will not be for money, they need to be appraised. Based on the amount at stake, a successful claimant will be able to recover fees set by the German Attorney Fee Act (RVG), which sets variable lump sums for certain procedural steps, which are determined by court order. Moreover, court fees will have to be paid in accordance with the Court Fee Act (GKG). If the claimant only partially prevails, the court will determine the portions in which each party has to bear costs. In most instances, a party and their representatives will agree on a higher remuneration that better reflects the work done. The difference between the fixed amount and the paid higher fee is not recoverable from the other side. The recoverable costs are very moderate in comparison with other countries.

For example, if the amount at stake is set at €10 million, a fully winning claimant could recover, excluding eventual VAT, under RVG and GKG, roughly €230,000, plus recoverable out-of-pocket expenses unless the case justifies representation by an attorney at law and a patent attorney. In the latter case, recoverable costs would double.

Interestingly, in litigation cases, German attorneys at law are not permitted to charge fees below the amounts set by the RVG.

Litigation funding

What litigation funding options are available?

Third-party funding is not restricted by regulations. However, attorneys at law are severely restricted in their ability to enter into contingency fee agreements by ethical regulations in Germany.

Alternative dispute resolution

What alternative dispute resolution (ADR) methods are available to resolve trade secret disputes?

All alternative dispute resolutions methods are available for resolving civil trade secret disputes. The most frequently practised ADR method is arbitration, which, in a purely national context, often includes settlement discussions facilitated by the arbitrators and triggered by sharing their preliminary views on relevant aspects of the case, when the parties agree or request it. Such requests are common. Of course, that practice would be unusual in international cases. Mediation, early evaluation or early (non-binding or binding) determination by experts are practised, if the parties agree.

Notwithstanding this, in most trade secret misappropriation cases there is no existing agreement on any such ADR method. Considering the grave nature of the claims, the parties would be unlikely to reach an agreement subsequent to ADR.

Enforcement risks

To what extent may enforcement of trade secret rights expose the rights holder to liabilities such as unfair competition?

Generally, to no extent, especially insofar as the enforcement of monetary relief is concerned. However, under the German Unfair Trade Practices Act, a party must be careful to avoid spreading misleading information in the market concerning the existing judgment or arbitral award and its bearing, since this could give rise to cease-and-desist and damage claims. Regarding cease-and-desist claims, there is a theoretical possibility that EU or German antitrust and cartel law concerning abuse of a dominant position in the relevant market comes to bearing. However, in German court proceedings, such a defence would need to be raised before the final judgment is issued. Concerning foreign judgments or arbitral awards that require recognition by the competent German court before execution, a defence of abuse of a dominant position in the relevant market could eventually be raised on (international) public policy grounds. The outcome will depend on the facts of the specific atypical case.

If interlocutory relief is initially granted but then lifted because the relief was not justified, the petitioner must compensate the other side for actual damages, irrespective of any fault. Infringers who act without intent or negligence may prevent a cease-and-desist or recall order by paying a commensurate amount of money based on licence fee analogy (section 11 of the GeschGehG).

Remedies

Injunctions

Under what circumstances can a rights holder obtain a preliminary or final injunction in a civil suit for trade secret misappropriation?

Preliminary cease-and-desist injunctions may be obtained if the claimant can establish to the satisfaction of the court that the matter is urgent and that its claims are well founded. Urgency requires that as of the date on which the claimant learned about the relevant facts, it has not remained inactive for too long a period before requesting the relief. If filed within one month from taking cognisance, the matter will always be considered urgent.

However, according to diverging court practices, and the facts, a longer period, for example, three months, may still meet the urgency requirement. This aspect should be addressed by obtaining legal advice as soon as a suspicion of trade secret misappropriation arises. The prima facie establishment of the merits of the claims is usually based on documentary evidence and - most importantly - affidavits.

Under section 6 of the Trade Secret Act (GeschGehG) final cease-and-desist injunctions may include an order for a recall of infringing products (section 2, No. 4 of the GeschGehG). However, pursuant to section 9, Nos. 1 to 7 of the GeschGehG such an injunction is not to be granted if it would be disproportionate taking into consideration the enumerated elements including public interest.

Damages

What rules and criteria govern the award and calculation of damages for trade secret misappropriation?

Under German law, the damages are assessed according to the general principles established in the German Civil Code. Simply, only actual damages may be obtained, which may include consequential damages. Punitive damages are not provided. If sufficient factual elements are established but the precise amount of damages

remains unclear, the court has the power of appraisal. Typical damage categories that are mutually exclusive and eligible by the claimant are loss of profits, a hypothetical licence, or the profits of the infringer. Damage claims require at least negligence.

As is the case for cease-and-desist injunctions, pursuant to section 9, Nos. 1 to 7 of the GeschGehG, damages are not to be granted if this would be disproportionate taking into consideration the enumerated elements including public interest.

Other civil remedies

Are any other civil remedies available for wilful trade secret misappropriation?

Civil remedies are cease-and-desist claims, claims for damages, and claims for the rendering of account or information regarding the activities that were enabled by the misappropriation, subject to section 9 of the GeschGehG. In certain cases, these claims may not only result from the GeschGehG but also other heads of claim such as wilful *contra bonos mores* acts.

The following remedies are also available:

- destruction or release of the documents, items, materials, substances or electronic files in the possession or property of the infringer that contain or embody the trade secret;
- recall of the infringing products, subject to section 9 of the GeschGehG;
- permanent removal of the infringing products from the distribution channels;
- destruction of the infringing products and withdrawal of the infringing products from the market; and
- if the protection of a trade secret is not affected, a claim for the publication of the judgment (section 9, nos. 1 to 7 of the GeschGehG).

Criminal remedies

What criminal remedies are available for trade secret misappropriation? Under what circumstances will they be awarded, and what procedural issues should be considered when seeking them?

Criminal remedies are available against natural persons. The GeschGehG also contains provisions that foresee criminal sanction (section 23 of the GeschGehG) if misappropriation was intentional. Moreover, in the context of carrying out the misappropriation, other illicit activities may be carried out that are triable under other statutes. The aggrieved party may file the criminal complaint, or the public prosecutor may take up the case ex officio if there is a public interest. If the case goes to criminal trial the aggrieved party could file an adhesion complaint for recovering damages. However, in most instances, the aggrieved party will use its controlled access to the results of the criminal investigations for obtaining additional information and often evidence that it could not lawfully obtain otherwise and that can be used in the civil proceedings.

The action taken by the prosecutor's office will also depend on public interest. The speed of the criminal investigation will largely depend on the public prosecutor's office and its resources. The aggrieved party has only limited influence on these aspects.

Administrative remedies

What administrative remedies are available for trade secret misappropriation? Under what circumstances will they be awarded, and what procedural issues should be considered when seeking them?

There is no specific procedure under German Administrative Law that would provide for remedies in cases of trade secret misappropriation.

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