

Trade Secrets Digital Edition 2021

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Germany

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PROTECTION

Legislation and legal definition

1 | What legislation governs the protection of trade secrets in your jurisdiction? How is a 'trade secret' legally defined?

Trade secrets are mainly covered by the new Trade Secret Act (GeschGehG), which implements Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of confidential know-how and confidential business information (business secrets) against unlawful acquisition, use and disclosure, and entered into force on 26 April 2019. Trade secrets may also be protected in parallel by claims based on other Acts (for example, by the Act Against Unfair Competition). However, these Acts regularly have a different scope of protection outside of the GeschGehG and therefore usually require special accompanying circumstances.

'Trade Secret' is legally defined as an information that is not, either as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons in the circles that normally deal with the kind of information and that is therefore of commercial value; that is subject to reasonable steps under the circumstances, by its rightful owner, to keep it secret; and where there is a legitimate interest in confidentiality (see section 2, paragraph 1 GeschGehG).

Ownership

2 | How is ownership of a trade secret established?

The trade secret owner is any natural or legal person lawfully controlling a trade secret (see section 2 paragraph 2 GeschGehG).

Secrecy

3 | What criteria are used to establish the state of secrecy of a trade secret before misappropriation or disclosure?

The GeschGehG does not provide for specific criteria. As this requirement is new in German legislation, the criteria will have to be defined in more detail by case law. Since the GeschGehG only entered into force in April 2019, there is no reliable case law yet.

It is to be expected that the assessment as to which secrecy measures taken are appropriate under the circumstances will require an objective consideration, which takes into account all circumstances of the individual case and that no excessive requirements will be made.

With respect to the criteria to be used to establish the state of secrecy it is prevailing opinion in the legal literature to implement a three-part distinction between top secret (highest protection level), important (medium protection level) and sensitive (low protection level) information. However, there are no specific criteria yet.

Commercial value

4 | How is the commercial value of a trade secret established?

There is no legal definition of the 'commercial value of a trade secret' required for information to be protected as trade secret. The threshold should, however, be very low and only such information be excluded that are 'irrelevant' and have no value from an economic point of view.

Protective measures

5 | What criteria are used to determine whether the rights holder has adopted reasonable protective measures to prevent disclosure and misappropriation of trade secrets?

The GeschGehG does not provide for certain protective measures. The legal literature highlights the need for inventory, documentation and classification of information, organisational measures (like IP compliance management, including instruction of employees and monitoring and controlling of security measures), restriction of the persons getting access to information, non-disclosure agreements (NDAs) that are not too general, technical access protection (password and encryption) and evidence-securing measures to enable legal prosecution, like 'digital watermarking' and 'signatures'.

Best practices

6 | What best practices and internal policies should rights holders consider to ensure maximum protection of their trade secrets?

Trade secret right owners must be able to prove to the satisfaction of the court that they have taken the appropriate measures to protect their trade secrets to prove their claims. This requires a policy and internal protection measures within the organisation of the right owner. Some of these measures are:

- systematic use of NDAs whenever trade secrets are shared with third parties, such as employees, suppliers, cooperation partners, external consultants, etc;
- physical and IT access restrictions to trade secrets on a need-to-know basis (role model);
- classification of trade secrets considering their value and sensitivity and applying customised measures with respect the different levels of secrecy; the higher the level of secrecy, the more restrictive numbers of persons who are given access, the higher the technical access protection and the more specific NDAs governing confidentiality of the trade secrets should be.

The above ultimately requires that there are processes in the rights owner's organisation that serve to identify and document trade secrets with a view of categorising their importance so that they may be assigned a relevance level, which, in turn, determines the level of

protective measures. These processes also comprise the management of NDAs and the information disclosed and received under each such agreement.

Such documented measures also assist in proving and defining the concerned trade secret in the event of misappropriation – an enforcement aspect that too often causes practical difficulties, except in simple clear-cut cases, such as misappropriated customer databases.

MISAPPROPRIATION

Definition

7 | What constitutes misappropriation of trade secrets?

The GeschGehG implements essentially the wording of the Directive (EU) 2016/943.

Therefore, misappropriation covers 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 as well as any other conduct that, under the circumstances, is considered contrary to honest commercial practices.

Furthermore, misappropriation covers use or disclosure of a trade secret that has been acquired unlawfully as set out before or being in breach of a duty not to disclose or use the trade secret.

The acquisition, use or disclosure of a trade secret is also be considered unlawful whenever a person, at the time of the acquisition, use or disclosure, knew or ought, under the circumstances, to have known that the trade secret had been obtained directly or indirectly from another person who was using or disclosing the trade secret unlawfully within the meaning set out before. This shall in particular apply if the use consists in the production, offering, placing on the market or import, export or storage for these purposes of products whose design, features, functionality, manufacturing process or marketing is based to a significant extent on an unlawfully obtained, used or disclosed trade secret.

Exclusions

8 | Are any activities explicitly excluded from the scope of trade-secret misappropriation?

Activities explicitly excluded from the scope of trade-secret misappropriation are

- independent discovery or creation;
- observation, investigation, dismantling or testing of a product or object that has been made publicly available or is in the lawful possession of the observer, examiner, dismantler or test person without any obligation not to obtain a trade secret in such manner;
- where this is done to protect a legitimate interest, in particular:
 - the exercise of freedom of expression and information, including respect for the freedom and plurality of the media;
 - for the purpose of detecting any illegal activity or professional or other misconduct, where the obtaining, use or disclosure would be likely to protect the general public interest; and
 - in the context of disclosure by employees to the employee representatives, if this is necessary to enable the employee representatives to perform their duties; and
- acts permitted by law, by virtue of a statute or by contract.

Elements of misappropriation

9 | How can the rights holder prove trade-secret misappropriation?

In substantive proceedings, evidence can be provided via expert opinions, inspection (particularly of goods or documents provided), party hearing (but only in exceptional cases), documents and witnesses. In preliminary proceedings the hearing of witnesses or parties can be replaced by affidavits.

Burden of proof

10 | How is the burden of proof distributed in trade-secret misappropriation claims?

It is a basic German principle that the claimant bears the burden of proof for any facts supporting their claim. In trade-secret misappropriation proceedings, this includes proving that the legal requirements are met, according to which the relevant information is considered a trade secret, as well as all circumstances from which a misappropriation act of the defendant arises. Furthermore, the statement of facts must have a certain substance and must not be too vague. Otherwise, there is no obligation of the defendant to contest the facts asserted by claimant in detail. If the statement of claims is sufficiently detailed and the defendant does not contest in detail with regard to factual assertions of which it may have knowledge, the facts asserted by the claimant are, however, considered as being admitted. The defendant may not deny factual assertions against its better knowledge.

Accordingly, the claimant must assert and be able to prove all facts and establishing the trade secret as such, its misappropriation, and damages. The defendant must assert and be able to prove defences such as the lawful procurement of the concerned information from a third source or the prior possession of such information.

Even in regard to facts for which the other party bears the burden of proof, a substantiated refutation may require offering counter-evidence.

For common law lawyers it is important to bear in mind that the court will only entertain evidence that supports written factual assertions that in its view are relevant for the decision and contested. The court will normally issue an order directing and limiting witness or expert evidence. Adducing evidence concerning other contested facts by witness (cross-) examination is not foreseen in German civil procedure. Accordingly, issue of burden of proof is closely related to the duty to substantiate factual assertions in writing prior to the hearing date and identifying meticulously the offered (witness) evidence in relation to specific assertions. Discovery is not available in German Courts. Only specific identified documents may be requested from the other party, if unavailable and relevant.

Extraterritorial acts

11 | Can acts taking place outside your jurisdiction support a charge of trade-secret misappropriation?

If the territorial international competence of a German court in civil proceedings can be established, facts occurring outside of Germany may be considered. Since international jurisdictions concerning torts under German and EU procedural law require a factual nexus of the trade secret misappropriation with Germany, acts or omissions that take place outside of Germany will need to be part of the trade secret misappropriation triable under GeschGehG. If there is a valid choice of venue clause that covers also the tort of trade secret misappropriation, acts or omissions occurring outside of Germany may also be considered. Evidence is taken according to the ZPO (German Civil Procedural Act) and the regulations concerning the taking of evidence outside of Germany by German Courts.

Furthermore, if the German court has international jurisdiction, depending on the specific circumstances, the German court may apply foreign law regarding trade secrets.

ENFORCEMENT PROCEEDINGS

Causes of action

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

The GeschGehG provides for a whole range of statutory claims in 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. Furthermore, the claim for damages may also be determined on the basis of the amount which the infringer would have had to pay as appropriate remuneration if he 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 are also contractual claims on which the claims can also be and are typically based.

Court jurisdiction

- 13 | 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 (*Landgericht*) in whose district the defendant has his or her general place of jurisdiction has exclusive jurisdiction in 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.

Internationally, if the defendant is domiciled or established outside of Germany, the German Court will establish its international jurisdiction in accordance with EU Regulation (EU) No 1215/2012 of 12 December 2012. In relation to 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) GeschGehG establishes exclusive jurisdiction, at the place where the tortious act is being committed. EU and German law allow choice of forum clauses for establishing jurisdiction.

Procedural considerations

- 14 | What is the typical format and timetable of proceedings?

In regard to 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 of time. 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 a six to 12 months period. 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 some 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 a large number of witnesses of fact.

Limitation periods

- 15 | 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

- 16 | 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. Furthermore, instigators and assistants of the infringers can be liable under certain circumstances. If there is no jurisdiction of different courts, multiple parties 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

- 17 | 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, there is the possibility to have the criminal prosecution authorities investigate and secure evidence by means of a criminal complaint. Basically, 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.

Furthermore, 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

18 | 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 treated as party submission and not as compelling means of proof.

Confidentiality during litigation

19 | 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 case the 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 a 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

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

Common defences in civil proceedings are:

- the asserted trade secrets of claimant are not being used;
- the asserted trade secrets of 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 claimant were not misappropriated because they were obtained by independent efforts of respondent or lawfully from a third source;
- procedurally, 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 of public interest.

Appeal

21 | 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 an opposition (*Widerspruch*) filed 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.

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 to be admissible. The grounds of admission are stated in the ZPO. In interlocutory injunction proceedings new evidence is allowed at the appeal stage without restriction, provided that the late submission is not regarded as lack of urgency.

Costs

22 | 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 on the basis of the value at stake that varies depending on the economic importance of the matter for the claimant. 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) that sets variable lump sums for certain procedural steps and are determined by court order. If 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 defendant could recover under the RVG roughly €95,000 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

23 | 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

24 | 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, binding) determination by experts are practised, if the parties agree.

Notwithstanding this, in most trade secret misappropriation cases there may be no existing agreement on any such ADR method. Considering the grave nature of the claims, it will be not very likely that the parties reach an agreement subsequent on ADR in such settings.

Enforcement risks

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

Generally speaking, to no extent, especially insofar as the enforcement of monetary relief is concerned. However, under the German Unfair Trade Practices Act UWG, a party must be careful to avoid spreading of misleading information in the market in relation to 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 judgements 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.

REMEDIES

Injunctions

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

Preliminary injunctions to cease and desist 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 a too long period before requesting the relief. If filed within one month from taking cognisance, the matter will always be considered being 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.

Damages

27 | 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. Basically, 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 a 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.

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Other civil remedies

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

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

Furthermore, the following remedies are 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; permanent removal of the infringing products from the distribution channels; destruction of the infringing products or withdrawal of the infringing products from the market, if the protection of a trade secret is not affected, a claim for the publication of the judgment.

Criminal remedies

29 | 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 GeschGhG also contains provisions that foresee criminal sanction. Moreover, in the context of carrying out the misappropriation other illicit activities may be carried out which are triable under other statutes. The aggrieved party may file a criminal complaint with the 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

- 30 | 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.

UPDATE AND TRENDS**Key developments and future prospects**

- 31 | What were the key judicial, legislative, regulatory and policy developments of the past year in relation to the protection and enforcement of trade secrets? What are the prospects for future developments?

The GeschGhG was only promulgated on 18 April 2019. In comparison with the protection of trade secrets under the prior rules contained in the UWG, it strengthens the protection of trade secrets. However, by requiring active protection of the trade secrets, it potentially raises the barrier for protection, since under the UWG only an objectively discernible will to keep the information secret was deemed to be sufficient. Moreover, the exclusion of the statutory claims under the GeschGhG if their fulfilment would be disproportionate in the individual case gives courts a much wider discretion as it existed previously. Accordingly, case law is expected that will give these provisions more contour and foreseeability.

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