

## OVERVIEW OF NATIONAL AND REGIONAL TRADE SECRET SYSTEMS

### GERMANY

#### 1. Sources of law

Germany implemented the European Trade Secret Directive in April 2019 by means of the Act on the Protection of Trade Secrets (*Gesetz zum Schutz von Geschäftsgeheimnissen* (GeschGehG)).<sup>1</sup> Before its enactment, trade secrets were mainly protected through unfair competition law.<sup>2</sup>

#### 2. Definition of a trade secret

The definition of a trade secret slightly differs from the European Trade Secret Directive. Section 2 of the GeschGehG defines a trade secret as 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;
- (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.

The Act on Protection of Trade Secrets requires “economic value” whereas the European Trade Secret Directive uses the term “commercial value”, according to the German legislative reasoning,<sup>3</sup> it cannot be inferred that a substantive deviation was intended. Further, the legitimate interest required in the GeschGehG is not in the legislative text of the European Trade Secret Directive but in recital (14).

#### 3. Scope of trade secret protection

According to Section 3(1) GeschGehG, a trade secret may be acquired, in particular, by:

- independent discovery or creation;
- observation, reverse engineering or testing of a product or an item, which has been made publicly available or is in the lawful possession of the person that is observing, deconstructing or testing and that person is not subject to a trade secret acquisition restriction;
- exercise of the rights of employees to information and consultation or the rights of employee representatives to participation and co-determination.

In addition, a trade secret may be acquired, used or disclosed if it is permitted by law, on the basis of a law or by legal transaction (Section 3(2) GeschGehG).

According to Section 4(1) GeschGehG, a trade secret may not be acquired by:

- unauthorized access to, appropriation of, or copying of, documents, objects, materials, substances or electronic files under the lawful control of the trade secret holder, which contain the trade secret or from which the trade secret can be deduced;
- or

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<sup>1</sup> Available at: <https://www.wipo.int/wipolex/en/text/586322>; working translation in English: [https://www.gesetze-im-internet.de/englisch\\_geschgeh/englisch\\_geschgeh.html#p0020](https://www.gesetze-im-internet.de/englisch_geschgeh/englisch_geschgeh.html#p0020).

<sup>2</sup> This document aims to provide an overview (June 2024). It is not a complete review of the legal situation and case law. For further information, interested readers may consult: Haertel, The Trade Secrets Directive - Germany, les Nouvelles (2019), p.190, available at Social Science Research Network (SSRN) <https://ssrn.com/abstract=3420356> ; Heinz Goddar, Melanie Mueller in Trade Secrets throughout the World (Jager et.al.), 2023, Chapter 15 Germany.

<sup>3</sup> See BT Drucksache 19/4724, available at: <https://dserver.bundestag.de/btd/19/047/1904724.pdf>.

- any other conduct which, under the circumstances, does not comply with the principle of good faith, taking into account honest market practices.

Further, according to Section 4(2) GeschGehG, a trade secret may not be used or disclosed by anyone, who:

- acquired the trade secret by an own act according to Section 4(1) GeschGehG;
- violates an obligation to restrict the use of the trade secret; or
- violates an obligation not to disclose the trade secret.

Moreover, a person, who has obtained the trade secret through another person and who knows or should know, at the time of obtaining, using, or disclosing the trade secret, that such person has used or disclosed the trade secret contrary to Section 4(2), may not obtain, use, or disclose the trade secret (Section 4(3) GeschGehG).

#### 4. Exceptions

Section 1 of the Act on the Protection of Trade Secrets limits its scope. The freedom of expression and information in accordance with the Charter of Fundamental Rights of the European Union (OJ C 202, 7.6.2016, p. 389), including respect for freedom and plurality of the media, remains untouched by the Act. Similarly, the following rights are not affected by the Act: (i) the autonomy of the social partners and their right to conclude collective agreements in accordance with existing European and national rules; and (ii) the rights and obligations arising from the employment relationship and the rights of employee representatives.

Section 5 GeschGehG defines that acquiring, using or disclosing a trade secret does not fall under the prohibited actions prescribed in Section 4 GeschGehG, if it is done to protect a legitimate interest. In particular, Section 5 GeschGehG refers to:

- exercise of the right to freedom of expression and information, including respect for the freedom and plurality of the media;
- revealing an unlawful act or professional or other misconduct, if the acquisition, use or disclosure is likely to protect the general public interest;
- in the context of disclosure by employees to the employee representative, if such disclosure is necessary for the employee representation to perform its duties.

#### 5. Civil remedies

Available remedies in case of unlawful acquisition, disclosure or use of a trade secret are found in Sections 6 to 10 GeschGehG. They are:

- removal of the infringement. An injunction may also be granted when a trade secret misappropriation has not yet occurred but there is a threat of it;<sup>4</sup>
- destruction or surrender of the documents, objects, materials, substances or electronic files in the infringer's possession or ownership that contain or embody the trade secret;<sup>5</sup>
- definitive withdrawal of infringing products from the market<sup>6</sup> or their destruction;<sup>7</sup>
- rendering of accounts;<sup>8</sup>
- damages.<sup>9</sup>

In addition, the court has the discretion to grant the succeeding party the right to make the judgment, or information about the judgment, publicly known at the expense of the losing

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<sup>4</sup> Section 6 GeschGehG.

<sup>5</sup> Section 7, No. 1 GeschGehG.

<sup>6</sup> Section 7, No. 2, 3 and 5 GeschGehG.

<sup>7</sup> Section 7, No. 4 GeschGehG.

<sup>8</sup> Section 8 GeschGehG.

<sup>9</sup> Section 10 GeschGehG.

party, provided that the succeeding party demonstrates a legitimate interest in so doing (Section 21(1) GeschGehG).

Proof of appropriate confidentiality measures needs to be provided by the claimant in order to get those remedies. Furthermore, the above claims shall be excluded if they would be disproportionate in the individual case.<sup>10</sup>

## 6. Criminal sanctions

If a person misappropriates a trade secret in accordance with Section 4(1) no.1, 4(2) no.1 or no 3 GeschGehG in order to promote one's own or another's competition, for one's own benefit, for the benefit of a third party or with the intention of causing damage to the owner of an enterprise, it may be subject to criminal sanctions. The punishment depends on the exact action and can be a fine or imprisonment up to 2, 3 or 5 years under the conditions laid down in Section 23 GeschGehG. Since Section 23(7) GeschGehG refers to Section 5 no. 7 of the German Criminal Code, criminal sanctions against trade secret misappropriation apply not only to actions by companies located in Germany and companies having a registered office in Germany but also to actions by companies having a registered office abroad if they are depending on a company based in Germany or forming a group with such a company. An attempt of any offence according to Section 23 GeschGehG is also punishable.<sup>11</sup>

Any offences according to Section 23 of the GeschGehG will only be prosecuted upon request unless the prosecuting authority considers acting *ex officio* necessary due to special public interest.<sup>12</sup>

In addition, criminal sanctions for certain professions such as medical doctors or attorneys-at-law apply according to section 203 of the Criminal Code, which remains untouched according to Section 1 of the GeschGehG.

## 7. Protection of trade secrets in judicial proceedings

Section 16 concerns preservation of confidentiality in actions by means of which claims are asserted under the Act on the Protection of Trade Secrets (trade secret disputes). For those actions, the court of the main instance may, upon request of one of the parties, classify all or part of the information in dispute as confidential in whole or in part, if such information may constitute a trade secret.<sup>13</sup> Accordingly, the parties, their legal representatives, witnesses, experts, other representatives and all other persons involved in trade secret litigation or who have access to documents of such litigation shall not use or disclose such confidential information outside of judicial proceedings, unless they have gained knowledge of it outside of the proceedings (Section 16(2) GeschGehG). Any violation of the obligation under Section 16(2) GeschGehG can be subject to a fine of up to 100.000 EUR, or in case of non-payment, imprisonment of up to six months (Section 17 GeschGehG).

In case where the court classifies certain information confidential, the legitimate third parties shall only get access to a file, in which trade secret information is made illegible. In addition, in accordance with Section 19 GeschGehG, a court may limit access to the confidential information to a restricted circle of persons. It however applies only to the extent that, after weighing all circumstances, the interest in secrecy exceeds the right of the parties to be heard, also taking into account their right to effective legal protection and a fair trial.

According to Section 18 GeschGehG, in general, the confidentiality duties remain valid even after the termination of the judicial proceedings. This, however, does not apply if the court

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<sup>10</sup> See with further details, Section 9 GeschGehG.

<sup>11</sup> Section 23(5) GeschGehG.

<sup>12</sup> Section 23(8) GeschGehG.

<sup>13</sup> Section 16(1) GeschGehG.

denies the existence of the trade secret under dispute or as soon as the confidential information becomes known or readily accessible to persons in the relevant circle.

Since the confidentiality measures prescribed in Sections 16 to 20 GeschGehG apply to only trade secret misappropriation proceedings, Section 145 of the German Patent Act provides the similar measures for patent proceedings.<sup>14</sup>

## 8. Procedural provisions

### *Competent Courts*

The GeschGehG contains certain specific procedural provisions for actions under this law. Competent courts are defined in Section 15 GeschGehG.

### *Statute of Limitation*

The GeschGehG contains a special provision as to the claim for surrender after the occurrence of limitation of the claim to damages. According to Section 13, the claim for surrender is time-barred to six years after it arose. Otherwise, the general statute of limitation applies.

### *Burden of Proof*

In civil law claims arising from the GeschGehG, the general civil procedural law (principle of contribution of the facts by the parties) applies. In criminal proceedings, the principle of public investigation applies. Accordingly, the prosecution and the court need to carry out inquiries on their own behalf after a request is made under Section 23 GeschGehG or without request due to public interest.

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<sup>14</sup> German Patent Act available at: <https://www.wipo.int/wipolex/en/text/584996>.