

Business and Trade Secrets 4.0

The Business and Trade Secrets Act (GeschGehG) and the “Digital Safe” – Businesses Need to Act Now!

INTRODUCTION

It's something everyone is familiar with. People with know-how from sales, development and other sensitive areas are constantly moving to a competitor or are even the targets of direct poaching. This is not just a matter of what is in their heads but also the tangible know-how these people have come into contact with by necessity. Whether this concerns specific construction or design plans, manufacturing processes, recipes, marketing strategies, installation manuals or the more profane customer lists, the protection of business and trade secrets is becoming more and more important in this fast-paced age of globalization, digitalization and work 4.0.

This is probably what moved the German legislator to liberate business and trade secrets from their shadowy existence in Sec. 17 Unfair Competition Act and initiate a statute to protect such business and trade secrets, the Business and Trade Secrets Act (*GeschGehG*). That's the good news; the bad news, at least from the standpoint of businesses, follows right behind, for one of the key elements of the Business and Trade Secrets Act is a legal definition of the business secret itself, which, as opposed to previous practice, demands some action by businesses to fortify them in the event of a problem and to ensure that they do not lose the legal protection of their business and trade secrets.

OBJECTIFIED SECRECY DEFINITION: REASONABLE MEASURES

One of the core aspects of the „Act for the Protection of Business and Trade Secrets“ (*GeschGehG*) that was passed by the Bundestag at the end of March, 2019 and was just approved by the Bundesrat in April is the objectified definition of a secret. Where Sec. 17 Unfair Competition Act states that a primarily subjective will to keep something secret (which only had to be objectively manifested in some kind of form) was sufficient, the following is required under Sec. 2 (2) *GeschGehG*:

A business secret is (only) information that

- a) *is neither in its entirety nor in the exact order and compilation of its elements generally known by individuals in the groups that normally handle this kind of information nor is easily accessible and thus of economic value and*
- b) *is the subject of reasonable measures to maintain secrecy by its lawful owner in keeping with the given situation;*

The core aspect in this context is the requirement of **reasonable measures to maintain secrecy** for the specific form of which lawmakers provide a few principles (cf. BT-Drucks. 18/4724, (24)):

*„What types of secrecy measures must be specifically executed depends on the type of business secret in the individual case and the specific circumstances of its use. Possible measures are both **physical access restrictions** and precautions as well as **contractual security mechanisms**. It is not necessary to separately label every piece of information which is to be kept confidential. General measures for certain categories of information could be taken (such as technical hurdles) or this could be required in general internal rules and instructions or even in employment contracts.*

When evaluating the reasonableness of protective measures, in particular the following aspects can be taken into account: the value of the business secret and its development costs, the nature of the information, the significance for the business, the usual secrecy measures in the business and the negotiated contractual provisions with employees and business partners.“

OTHER ELEMENTS: WHISTLEBLOWER PROTECTION, ETC.

In addition to this new definition of secrets, there are also a few other new aspects that have the potential to weaken the protection of secrets. This applies, above all for the **protection of whistleblowers**, under the terms of which divulging business secrets is supposed to be justified if this occurs to protect a legitimate and justified interest.

ADVICE FOR BUSINESS PRACTICE: „DIGITAL SAFE“ IS REQUIRED

Is the Business and Trade Secrets Act a *reformatio in peius*, a change for the worse? It probably is, but irrespective of what one may think of the legal reforms, **businesses need to act!** Until now, virtually nothing had to be undertaken to claim legal protection for business and trade secrets; protection of the existing status was virtually guaranteed. That has now changed. **Before being able to claim a business or trade secret, a comprehensive security concept** is necessary to be able to defend oneself if necessary. This concept is comprised of three levels:

- (i) **Legal level:** This includes, above all, non-disclosure agreements and information on all levels, including in employment contracts or internal guidelines/instructions, but also in other

work/service contracts with external cooperating partners and service providers.

(ii) Organizational Level: In addition, organizational measures such as access restriction are required to ensure that the group of people is limited to individuals privy to business secrets with a need to know to conduct their work.

(iii) Technical Level: Finally, in the age of digitalization, IT security measures are becoming even more important inasmuch as business secrets are in digital form, which is practically always the case.

If these measures are not in place, businesses will hardly be able to invoke the claim of a business secret.

Employment law sanctions of every nature, cease and desist claims, damages and/or contractual penalties will be worthless!

This is why we urgently recommend casting a light on the current status of protective measures. As a rule, this will be no “big deal“ because businesses often have already installed many of the cited measures only for actual reasons despite the broad definition of secrets in the Unfair Competition Act so that **merely a few adjustments may need to be made in (employment) contracts, internal guidelines, etc. to make them compliant to the new requirements.** Be that as it may, this should be addressed without delay so that the protection of business and trade secrets is not sacrificed!

Please do not hesitate to contact us if you have questions on this topic. We would be very happy to include you on the list of subscribers to our free newsletter in which we also regularly discuss topics relating to labor law as well as issues at the interface to compliance (IVV, data protection, classification matters and temporary lease of employees, investigations etc.). Just send us a brief [Mail](#) with your request.

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