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LIDC 2015, Question B: The protection of trade secrets and know-how**Austrian Report****by the national reporters:¹****MMag. Juliane Messner****Dr. Max W. Mosing, LL.M. (IT-Law), LL.M. (Strathclyde)****Mag. Rainer Schultes!*****Does the Austrian legislation provide for specific provisions on the protection of trade secrets?***

Business and trade secrets are enterprise related commercial or technical facts, which are known only by a limited and determined number of people and which are not generally accessible or only with difficulty, and which following the intention of the person entitled to claim secrecy should not pass behind the circle of the people informed, and in the secrecy of which the owner of the business has an economic interest (Burgstaller, Der strafrechtliche Schutz wirtschaftlicher Geheimnisse, in Ruppe, Geheimnisschutz im Wirtschaftsleben, Orac 1980, 12). The facts in question must be business related. This excludes mere scientific secrets as well as untrue statements. Those are not considered facts.

A distinction can be made between trade secrets which mainly refer to commercial aspects (e.g. distribution of goods, capacity, strategies, et cetera) and business secrets which mainly refer to technical aspects (like manufacturing processes, materials used, et cetera). For the application of law, the differentiation is of no importance, since the law itself does not distinguish.

The protected fact must not be obvious. The circle of persons who know the effect must be determined. Any fact, which has become public by way of publication or on an exhibition can be regarded as available to the public. In this regard, it is of no importance, whether the fact is new (Burgstaller, Der strafrechtliche Schutz wirtschaftlicher Geheimnisse, in Ruppe, Geheimnisschutz im Wirtschaftsleben, Orac 1980, 13). Another criterion is the explicit or implicit intention to keep the fact secret. Finally the interest in keeping the fact secret is a criterion. This is to be evaluated on an objective basis. It is not in the disposition of the person entitled in the business or trade secret to voluntarily declare facts to be subject of secrecy. The subjective interest of secrecy must be accompanied by an objective interest in the secrecy.

The Austrian Law provides for the protection of trade secrets prevalently in the Act against Unfair Competition, specifically in sections 11 to 13 but also in the Penal Code. These provisions are supported by the general clause according to section 1 of the Austrian Unfair Competition Act. Also Sections 11 and 12 are provisions of criminal law.

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The general nature of these provisions is the disclosure or exploitation of trade or business secrets, that have been entrusted to the offender in the course of a professional occupation, or which have been obtained by espionage. The penalties in question are imprisonment or fines. The legal values protected under this framework are the legitimate interest in the confidentiality of trade and business secrets and to punish infringements of such legitimate interests.

These provisions read as follows:

General clause on Unfair Competition

§ 1. (1) *Anyone who in the course of business*

1. *resorts to an unfair commercial practice or another unfair practise which is likely to distort not only insignificantly [=materially] the competition to the detriment of enterprises or*
2. *uses an unfair commercial practise contrary to the requirements of professional diligence and [which] is with regard to the respective product suitable to materially distort the economic behaviour of the average consumer whom it reaches or to whom it is addressed, may be sued for a cease-and-desist order and in case of fault for payment of damages.*

(2) *In case a commercial practise reverts to a group of consumers, the average member of such group will be deemed as the average consumer. Commercial practices against consumers which are likely to materially distort the economic behavior only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity, have to be assessed from the perspective of the average member of that group.*

Disclosure of Business or Trade Secrets. Misuse of Entrusted Documents

§ 11. (1) *Anyone who, as employee of an enterprise [and] during the duration of employment discloses without authorisation any business or trade secret which due to his employment has been entrusted or has been made accessible [to him], to another [party] for competitive purposes shall be sentenced by the court to a term of imprisonment of up to three months or a fine of up to 180 per diem rates. (Federal Law Gazette no. 120/1980, Article I Sub§ 6)*

(2) *The same punishment shall be meted out to the one who, without authorisation and for competitive purposes uses or discloses to others any business or trade secret which he has received by information as set forth in Para 1 above or by an act of his own which is illegal or contrary to public policy.*

(3) *The offence shall be prosecuted only upon request of the injured [party].*

§ 12. (1) *Anyone who, without authorisation and for competitive purposes, uses or discloses to another party any technical documents or requirements entrusted to him in the course of business shall be sentenced by the court to a term of imprisonment of up to three months or a*

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fine of up to 180 per diem rates. (Federal Law Gazette no. 120/1980, Article I Sub§ 7)

(2) Para 1 shall not be applicable when the documents or requirements have been entrusted by the owner of an enterprise to his/her employee.

(3) The offence shall be prosecuted only upon request of the injured [party].

Claims under Civil Law in the cases covered in Sections 10 through 12 Unfair Competition Act

§ 13. Anyone who violates any of Sections 10 through 12 may furthermore be sued for a cease- and-desist order and payment of damages.

Section 11 of the Act against Unfair Competition requires either actual disclosure or unauthorized use of the trade or business secret for competitive purposes to give rise to criminal liability.

Sections 11 and 12 of the Act against Unfair Competition have very little forensic significance. The practical importance of these two provisions is based on the civil law remedy in the form of claims for cease and desist orders and damages.

About the provisions of the Austrian Act against Unfair Competition, the following provisions may be used in order to protect trade secrets against misappropriation.

In the Austrian Criminal Code, three articles deal with the violation of trade and business secrets. Section 122 deals with the violation of trade and business secrets, section 123 with the exploration of trade and business secrets and section 124 with the exploration of trade and business secrets in favour of a foreign country.

Section 122 (1) of Penal Code stipulates that either disclosure or exploitation of trade or business secrets gives rise to criminal liability. Sections 123 and 124 of Penal Code require the spying out of trade or business secrets in order to give rise to criminal liability.

Section 122 Penal Code:

(1) Anyone who discloses or exploits a trade or business secret (Para 3) which has been entrusted or made accessible to him in the course of his activity in exercising a surveillance, review or investigation enacted by the law or governmental order, shall be sentenced to a term of imprisonment of up to six months or a fine of up to 360 per diem rates.

(2) Anyone who commits the deed to obtain a pecuniary advantage for himself or somebody else or to cause a detriment to somebody else, shall be sentenced to a term of imprisonment of up to one year or a fine of up to 360 per diem rates.

(3) Para 1 comprises only trade or business secrets which the offender is obligated to keep secret by law and the disclosure or use of which is suitable to infringe the reasonable interest

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of the person subject to the surveillance, review or investigation.

(4) The offender shall not be punished if the disclosure or exploitation is justified in content and form by a public or justified private interest.

(5) The offender shall be prosecuted only upon the request of the person whose interest in secrecy is infringed (Para 3).

According to section 122 of the Criminal Code, only a person, who in the course of a review, inspection or control ordered by a public authority or by law, has access to trade or business secrets, or, to whom the secrets are entrusted, and, who by law is requested to keep the secrets, is subject of section 122 Criminal Code. The legal duty to keep the trade or business secret can be included in different laws, while a contractual obligation to keep a secret is not enough to make section 122 Criminal Code applicable. It is not relevant, whether the person has gained knowledge of the secrets in the course of his business or whether it has been entrusted to him. Section 122 therefore is in direct overlap with § 11 para 2 Unfair Competition Act.

The offender must either disclose or utilise the trade or business secret. If the person which was communicated the fact already knew it, the presence of a secret is excluded. The provision of one single person with the unknown fact is sufficient (Leukauf & Steininger, Kommentar zum Strafgesetzbuch³, 723).

A prerequisite for punishment is that the disclosure or utilisation of the secret harms the justified interest of the person who is able to claim its protection. The mayor suitability to harm the interest of the trade secret holder is sufficient (Zipf, Wiener Kommentar zum Strafgesetzbuch, §§ 118-124, 55). Another prerequisite for criminal liability is intent. The intent of the offender must be directed towards explaining and utilising the business or trade secret or towards forwarding it to someone else for utilisation. Conditional intent is sufficient.

Like the provisions of sections 11 and 12 of the Unfair Competition Act, infringement of the Criminal Code according to sections 122 to 123 is a private prosecution matter and is pursued solely upon request of the person calls right has been harmed. Consequently it is necessary to file an application for the crime to be pursued.

Sec. 123 Criminal Code:

(1) Whoever spies out a trade or business secret with the intent to exploit such secret or to make it available for exploitation by somebody else or to disclose it to the public, shall be sentenced to a term of imprisonment of up to two years or a fine of up to 360 per diem rates. Both penalties may be imposed collectively.

(2) The offender shall be prosecuted only upon request of the injured party.

In principle, anybody who explores a trade or business secret can violate section 123 Criminal Code. Only people who have the right to information are excluded. A partner in a company has a

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right to be given information connected to the business, but that should not allow him to explore the trade or business secret in any case. The type of company and the agreement of the partners must be considered when deciding whether or not he has committed a crime according to section 123 Criminal Code (*Schnopfhagen, Heine, Katanic*, Intellectual Property Law in Austria, p 227)

Any firm and direct effort to obtain a knowledge of the trade or business secret is considered an exploration. It is not relevant, whether the offender actually gains knowledge of the secret or whether the exploration is done factually, by legal transaction or through an illicit act.

Again conditional intent is sufficient. The intention of the offender must be directed towards explaining and utilising the business or trade secret or towards giving it to someone else to utilise it or make it publicly available.

Section 124 Penal Code:

(1) Whoever spies out a trade or business secret with the intent that it shall be exploited, used or otherwise utilized abroad, shall be sentenced to a term of imprisonment of up to three years. In addition, a fine of up to 360 daily rates may be imposed.

(2) The same punishment shall apply to whoever discloses a trade or business secret, which he is obliged to protect, to exploitation, use or other utilization abroad.

Section 124 covers two offences:

- the exploitation of a business and trade secret for the purpose that it might be utilised abroad;
- the disclosure of the business or trade secret in order to use it abroad by a person who is obliged to keep it secret.

Section 124 of the Criminal Code can be violated by anybody, but it is required, that the offender is obliged to keep the secret. Depending on the facts of the case, the attempt to commit any of the offences enlisted above may give rise to criminal liability. According to Sec. 15 (2) of Criminal Code, an offender attempts to commit an offence if the decision to carry out the offence has been actuated by an act that directly precedes the actual carrying out of the offence. Preparatory acts remain unpunished.

Additional provisions on the infringement of professional confidentiality (Section 121 of the Criminal Code) and the infringement of official secrecy (Section 310 of the Criminal Code) are designed to protect the legitimate interest in the confidentiality of a trade secret. The conduct that is considered as criminal by these Sections is the disclosure or exploitation of trade secrets that have been entrusted to the offender during a professional relationship (or which have been obtained by espionage).

In addition to these provisions of the Criminal Code and the Austrian Unfair Competition Act, the Austrian Data Protection Act (DSG) contains another pertinent penal provision:

Use of Data with the Intention to make a Profit or to Cause Harm

Section 51. (1) Whoever with the intention to enrich himself or a third person unlawfully or to harm someone in his entitlement guaranteed according to § 1 para 1 deliberately uses personal data that have been entrusted to or made accessible to him solely because of professional reasons, or that he has acquired illegally, for himself or makes such data available to others or publishes such data with the intention to make a profit or to harm others, despite the data subject's interest in secrecy deserving protection, shall be punished by a court with imprisonment up to a year, unless the offence shall be subject to a more severe punishment pursuant to another provision.

Also Section 51 Data Protection Act overlaps with Section 11 para. 2 Unfair Competition Act. According to Austrian case law, the subsidiarity clause of Section 51 para 1 Data Protection Act shall not apply.

In labour law, the Austrian jurisdiction has developed a definition for the term secret. A secret is a fact which is only known to a determined number of people are, which is not easily accessible for third parties and which affects the employer wishes to keep secret and upon which, the employer has an objective interest of secrecy.

Finally, the Patent Act – Patentgesetz, provides that the employee must keep his employee's invention secret prior to the acceptance of the invention by his employer (in order not to obstruct patentability).

Do the legal provisions offering protection against trade secrets misappropriation apply towards third parties (like the new employer of an ex-employee), i.e. parties who gained access to the trade secrets through someone who is not the trade secret appropriate?

Section 11 para 1 Unfair Competition Act sanctions the illegal communication of trade or business secrets via employees of the company during their working relationship to a third party. Section 11 para 2 Unfair Competition Act further prohibits cases of industrial spying such as the unfair exploitation by third parties or employees. According to the clear wording of the law, the employee has to consciously communicate the secret during the term of its contract with the employer.

The exploitation or communication of the business or trade secret may be sanctioned according to section 1 Unfair Competition Act.

The unauthorised use or disclosure of any document entrusted to a party may be sanctioned under section 12 Unfair Competition Act.

Sections 11 and 12 of the unfair competition act are criminal sanctions. They are accompanied by section 13, which provides for a civil seize and desist claim. This seize and desist claim is directed in the first line against the infringer, thus against the Bestecher, respectively against the

employee. About that, any person involved, assistant or disturber can be sued, if they infringe the due diligence (deliktsspezifische Sorgfaltspflicht).

Which elements must trade secret proprietor establish in order to be able to launch legal action against trade secret misappropriation?

Under Austrian law there is no specific definition of a trade secret, even though the term “trade secret” (Geschäftsgeheimnis) appears in several laws. Trade secrets may concern technical aspects like the processes of the manufacturing of goods, details of a printing process, the methods of stocking goods or the construction of facilities.

Both Austrian criminal and civil law have developed similar standards for the definition of trade and business secrets:

- Commercial or technical information or processes in relation to the business of a company which are important for the competitive position of the company, and which are
- only known to certain and limited circle of people,
- which shall be kept confidential and with regard to which
- there is a legitimate economic interest in the confidentiality of the information or process.

Whether a fact is a trade secret or not, is to be evaluated on a case to case basis. According to the Austrian case law, a process for the manufacture of films for sequins, printing processes and processes for galvanising screws were considered trade secrets. Qualified as business or trade secret are also: strategic questions, conditions of purchase, distribution channels, customer lists, tennis lists, turnover on customer accounts, print methods, origin of raw materials, price calculation, sample collection, tenders, recipes, information on the production and storage of goods, methods of production. No business and trade secrets instead are part of a machine which could easily be unbolted and was accessible to everybody was not considered a trade secret.

Trade secrets may concern technical aspects like the processes of the manufacturing of goods, details of a printing process, the methods of stocking goods or the construction of facilities.

According to the Austrian case law, the trade secret must not be accessible to the public. Even if effect is accessible solely to a very limited number of people, it is no more a business or trade secret, if the information is easily accessible, for example via textbooks or the Internet. In practice, this means, that enforcing business or trade secrets makes only sense with regard to absolute secrets. The courts have to limit a cease-and-desist order, if from a certain moment on, the activity of the infringer is no more illegal, for example if the breach of the trade secret provides solely for a limited advantage in time versus the competitors.

Reverse Engineering is not considered a violation of a business secret, because the technical information can be gathered from an object, which is not subject to secrecy.

Which legal measures does a trade secret proprietor have at its disposal to secure evidence of trade secret misappropriation? Does Austrian law provide for instance for methods of seizures or ex parte injunctions?

Since all provisions are enforceable only privately, criminal house searches and seizures are available only to a very limited extent.

Civil law, instead, following the requirements of the EC-Enforcement Directive 2004/48/EC, provides for the possibility of house searches via provisional injunctions. Injunctions can also be issued to safeguard cease and desist claims, both ex-parte and inter-partes.

Procedural aspects and remedies in the event of trade secret misappropriation

A violation of any criminal law may lead to punishment.

Civil claims in Case of Infringement of a Business or Trade Secret:

- injunction (which usually encompasses destruction);
- rendering of accounts (although not explicitly provided by law);
- information on origin and distribution network (not provided by law but accepted in literature);
- monetary claims (adequate monetary compensation in analogy to license fees, or damages including loss of profits in case of culpability, alternatively the surrender of the profits made by the infringer (*Thiele in Wiebe UWG*², Section 13, margin no 47))

Destruction also has to encompass particular manufacturing plants insofar as they cannot be used for non-infringing activities.

The application for provisional injunction is usually, but not necessarily, combined with a complaint. The complaint can also be filed afterwards or vice versa. In case, the complaint is filed later, the court has to determine a time limit within which the respective complaint has to be filed.

The application for provisional injunction has to contain a detailed description of the facts. The danger of replication, which is a prerequisite for a provisional injunction, is already assumed in case of one infringement.

As a major difference to proceedings in the main cause, the level of proof is lower in provisional proceedings: prima facie evidence is sufficient. Each party has to convince the court that its argumentation is more likely to be true than that of the opponent. Thus, a level of persuasion of 51% is sufficient compared to the 'near certainty' required in proceedings in the main cause.

An application for provisional injunction aims at obtaining a cease and desist order and must not claim anything which would anticipate the definitive judgment (e.g., destruction, etc.).

No hearings are held in provisional proceedings. Only in exceptional cases, courts hear witnesses as informants without the parties or their representatives being present.

A provisional injunction is effective upon receipt by defendant. Under certain circumstances, the

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court may issue a Provisional Injunction upon Security Deposit. Foreign plaintiffs for example may under certain circumstances, be ordered to provide a bond for the costs of the proceedings.

A provisional injunction, however, might endanger the business of defendant as such and the effects of a granted injunction that turns out to be unjustified at the end of the day cannot always be reversed by plaintiff's obligation of indemnification according to section 394 Enforcement Act. Therefore, the court may condition the effectiveness of a provisional injunction by a security deposit of plaintiff.

Regarding the possibility of damage for defendant, there are two cases:

- insufficient evidence (section 390 paragraph 1 Enforcement Act); and
- sufficient evidence but consideration of interests in favour of defendant (section 390 paragraph 2 Enforcement Act).

Until deposit of a bond by the party in jeopardy, enforceability is suspended.

When applying for a provisional injunction, plaintiff may theoretically give defendant the possibility to suspend the effects of the injunction by depositing a security amount (section 389 paragraph 2 EO). Without such an application of plaintiff, the court can order such a security amount (section 391 paragraph 1, second sentence EO). In practice, such securities of defendants are not applied.

A provisional injunction, just like its rejection, does not have binding effect for the proceedings in the main cause.

Which measures are available to trade secret proprietor in the course of proceedings to preserve the confidential character of the information? For example, are there any mechanisms available in terms of restricted access to the hearing, to the documents, et cetera?

In general, or court hearings in Austria are public. By way of exception, the public may be excluded, precisely in case, a business or trade secret is at risk to be disclosed to this public. Court files, however are solely accessible to the parties of the proceedings.

It is not possible to exclude the other party from the access to the court file or to any document presented in court.

If court proceedings are anticipated by a provisional injunction and if in the course of these proceedings documents are seized, defendant may apply for scheduling the documentation which then can be accessed solely upon court order.

In order to encourage protection of trade secrets, instruments should be developed which respect the needs of both, the holder of a business or trade-secret such as of defendant. Such instruments must not interfere with the special relationship of confidence between the party and her attorney and which respect the fundamental principles of a fair procedure, in particular the Principle of Fair Trial, the Principle of Immediate Taking of Evidence and the Principle of Oral

Hearings. The Principle of Public Hearing already now may be restricted in case of business or trade secrets.

What remedies are available if a trade secret misappropriation is established? Can the trade secret appropriate to obtain damages for immoral prejudice suffered?

Under Austrian criminal law, an aggrieved person may bring damage claims in the course of criminal proceedings. However, a conviction in criminal proceedings also serves as a basis for the assertion of damage claims in civil proceedings – which will have to be initiated independently of the criminal proceedings.

The pertinent provisions of the Austrian unfair competition act are considered protective laws. Consequently civil responsibility is not limited to intentional violation, but includes also negligence.

As regards the extent of indemnification, the general rules of the Austrian civil law can be applied. Section 16 Unfair Competition Act explicitly states that any person who is entitled to claim damages may also request compensation for lost profits. In addition, the court may award a reasonable amount of money as a compensation for its insults or other personal disadvantages, if such an award is justified by the special circumstances of the case.

If several persons are liable for damages to be compensated, those persons shall be jointly and severally liable.

The owner of an enterprise may be enjoined from acts, which violate sections 1, 11 and 12 Unfair Competition Act, if the act was committed by another person in the operation of his enterprise. He shall be liable for damages in such cases if the conduct was known or should have been known to him.

The penalties applicable under sections 11 para 2 and 12 Unfair Competition Act shall also be imposed upon the owner of an enterprise if he has intentionally failed to prevent the act committed by another person in the operation of his enterprise.

If the owner of the enterprise is a corporation, a cooperative, and association or any other legal entity not being a natural person, the above shall apply to these members of the executive body of the enterprise who failed to act as specified therein.

The penal provisions of Sections 11 para 2 and 12 Unfair Competition Act shall not apply to employees who have committed the act upon the order of their employer if, due to their economic dependency, they could not be expected to refuse to carry out the act.

How are damages calculated in the event trade secret misappropriation is established? Does Austrian law provide for a system of discovery?

Monetary claims can be calculated in three different manners: Adequate monetary compensation

in analogy to license fees, damages including loss of profits in case of culpability or in alternative the surrender of the profits made by the infringer (Thiele in Wiebe UWG², Section 13, margin no 47)

Wherever the calculation is unreasonable, for example if extremely expensive, the courts may decide upon their own discretion. In that case the infringed person has to prove solely the first Euro of causal damage.

Protection of know-how in confidentiality or non-disclosure agreements

There are no particularities for non-disclosure agreements in the Austrian law, rather the general rules on contracts are applicable. Thus, a violation of a contractual obligation entitles for damages.

It is to be noted, that in case a non-disclosure or confidentiality agreements provides for a contractual penalty, the payment may hinder the enforcement of the agreement via cease and desist actions.

If certain know-how is protected under contractual terms, for example under a licence or confidentiality agreement, but the know-how does not meet statutory trade secret standards, would the trade secret proprietor in any event be entitled to remedies under contract law?

The violation of confidentiality agreements is per se very hard to prove. If a certain know how turns out to be available in the public, in general the proprietor will fail to prove the violation. If for particular reasons evidence of the violation can be provided, there is no reason to assume that for example a contractual penalty should not accrue.

Which remedies are available in the event of breach of a confidentiality or nondisclosure agreement protecting know-how?

Payment of the contractual penalty if stipulated or a cease and desist order.

Misuse of trade secret protection

We are not aware of any such case.

Is there any critique voiced regarding the scope of the protection of trade secrets?

The major problem in praxi is, that in most cases the presumed infringer would be able to develop the very same solution as protected by the business secret or to achieve the very same know-how during the respective enforcement. No cease and desist order must prohibit anything which can also be accessed in a legal way. Therefore cease and desist order often remain without effect currently.

Under which circumstances and under which legal remedies is there an illegal misuse of trade secrets?

n/a

Are there any remedies available if a trade secrets proprietor misuses its trade secrets?

The general rules of anti trust law apply , in particular those concerning a market dominant position.

Personal reflections

Criminal actions against infringements of business and trade secrets have not acquired a practical importance for proprietors. Civil actions often remain without any practical effect, since the courts are not allowed to prohibit anyone to exercise his/her rights. Any cease-and-desist order may be effective only as long as know-how is secret. Since nobody must be prohibited to use any knowledge which is publicly available, judgements remain ineffective, whenever defendants can demonstrate, that they would in the meanwhile have been able to develop or gain the know-how of the proprietor without using the know-how.

The Austrian group therefore proposes to introduce a punitive term to extend the cease and desist order beyond issuance of the judgement. The objection to having been able to obtain the secret know how by research as well should be excluded for a term to be discussed on international level. Such a term could also be staggered of the punitive cease-and-desist order could be staggered in accordance with the type of the secret or the typical development-time of the abused secret.

A flat rate damage compensation could be an alternative to deter from the misuse of trade secrets.