



THE PROTECTION OF TRADE SECRETS AND KNOW-HOW IN SWEDEN

Swedish report

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The legal protection of trade secrets and Know-how in Sweden

Introduction and background

The provisions on protection of trade secrets under Swedish law, are primarily stated in the Act (1990:409) on the Protection of Trade Secrets (the "Act"). The Act was adopted in the beginning of the 1990's and is specifically protecting trade secrets. The Act provides a unified protection of trade secrets and includes provisions on both civil and criminal liability.

Trade secrets are not considered to be an intellectual property right under Swedish law. Nevertheless it should be noted that trade secrets are often protected under intellectual property laws e.g. copyright - and/or patent protection. Technical drawings of production methods may constitute a trade secret under the Act while at the same time meet the requirements for work protected by copyright. Another example of where such an overlap may occur is in relation to source codes for software programs.

Further, trade secrets can be protected by various types of undertakings of confidentiality under contract law. The principle of the general duty of loyalty of employees also prevents employees from misappropriating trade secrets belonging to the employer during the course of employment.

Moreover, rules of protection of trade secrets and confidential information may be found in various statutory laws. Examples of statutory regulations concerning duty of secrecy the main purpose of which is to protect trade secrets are listed below:

- Section 6 of the Act on Authorization of Patent Attorneys (lag (2010:1052) om auktorisation av patentombud);
- Chapter 1, Section 11 of the Securities Act (lag (2007:528) om värdepappersmarknaden);
- Chapter 1, Section 10 of the Banking and Financing business Act (lag (2004:297) om bank- och finansieringsrörelse);
- Chapter 2, Section 19 of the Investment Funds Act (lag (2004: 46) om investeringsfonder);
- Chapter 9, Section 41 of the Companies Act (ABL) and Section 26 of the Auditors Act (revisorslagen 2001:883);
- Chapter 8, Section 4 of the CJP (RB), regarding lawyers' duty of secrecy;
- Section 5, second paragraph of the Act on the Right in Inventions by Employees (lag (1949:345) om rätten till arbetstagares uppfinningar).

Chapter 20, Section 3 of the penal code (BrB) states that anyone who unlawfully uses or discloses information covered by the duty of secrecy stipulated by such laws can be convicted of violation of the duty of secrecy (Sve Brott mot tystnadsplikten). In addition to the

duty of secrecy provided under the Swedish penal code, several other criminal offences that may, depending on the circumstances, be applicable in connection with an individual's misuse of trade secrets.

There is no defined term for "know-how" under Swedish law. Consequently, the term is not afforded any specific legal status under Swedish law. Confidential know-how can however meet the requirements of constituting a trade secret according to the Act and may therefore be granted protected under the said Act. Furthermore, information constituting know-how may also be covered by the definition of confidential information defined in Non-Disclosure agreements and thereby also be protected under contract law. Moreover, know-how can be protected by means of an intellectual property right, e.g. in the form of patent protection or copyrighted work. As such, know-how is protected under Swedish law provided that such information meets the requirement of protection under the Act and/or any other intellectual property right.

The Act does not include any limitations or remedies if a trade secret proprietor misuses its own trade secrets. Anyone who initiate legal proceedings devoid of merit before the court may, however, under general procedural regulations concerning costs for legal proceedings in courts, become liable for the adverse party's costs in the event of loss in court.

The Act on the Protection of Trade Secrets

The statutory regulations regarding the protection of trade secrets under Swedish law are, as indicated above, primarily specified by the Act. The regulations of the Act, concerning the specific elements that must be established by a trade secret proprietor in order to be able to commence legal proceedings against trade secret misappropriation under Swedish law, will be briefly described below.

The scope of the Act

The Act provides certain limitations, primarily in Sections 1-2 of the Act, aiming at balancing interests of an effective trade secret protection with the interest of movement of labour and the freedom of expression. The initial proposal for the Act was criticized for being a threat to the free movement of labour and the freedom of expression. The unions expressed their concerns and argued that the Act was too far-reaching and therefore created a considerable risk that it would prevent whistleblowers from calling for attention any illegal activities or other operational deficiencies of an employer. In order to address those issues, the regulation in Section 2 was added to the Act. Furthermore, it should be pointed out that the Act does not limit the regulations that safeguard the right of citizens to access documents in the possession of public authorities (i.e. principle of publicity), including, but not limited to, public courts in Sweden.

It is always the trade secret proprietor that has the burden of proof that all the prerequisite of liability under the Act are fulfilled.

The definition of trade secret under the Act

Section 1 of the Act contains the definition of “trade secret” and determines the type of information that constitutes a trade secret and consequently, is protected under the Act. In order for information to be classified as a trade secret under the Act, the information must meet the following criteria:

- 1) the information concerns business or industrial relations of a person conducting business or industrial activities
- 2) the person in question keeps the abovementioned information secret,
- 3) Disclosure of the information would likely cause damage to that person from a competitive point of view.¹

In order for information to be classified as a trade secret, it is required that *all three* abovementioned criteria are met. This means that should the information meet only two of the criteria, it will not constitute a trade secret. The three criteria will be described separately below.

Information concerning business or industrial relations of a person conducting business or industrial activities

The term ‘information’ stated in the Act has a broad meaning and is comprised of “information, knowledge and general knowledge of any kind”.² It does not matter whether or not the information is documented and/or exists only on the minds of certain individuals (see, Section 1, second paragraph of the Act). The information must, however, be directly linked to the particular business in order to meet the criteria “business or industrial relations of a person”.

The criterion “information” can be composed of individual business transactions and information on business transactions in general, e.g. market research, market planning, price setting estimates and plans on advertising campaigns.³ The term comprises both information about ongoing operation or production as well as information about development and construction, research, studies or similar.⁴ Other more specific examples of information having the characteristics of trade secrets according to Swedish case law are sales statistics, customer lists⁵, information about customers’ needs and desires⁶, personnel records holding information about the employees’ qualifications⁷, co-operation agreements⁸, drawings⁹ and

¹ Prop. 1987/88:155 p. 34.

² Prop. 1987/88:155 p. 34.

³ Prop. 1987/88:155 p. 35.

⁴ Prop. 1987/88:155 p. 35.

⁵ See, in particular, AD 2000 No 3, in which Arbetsdomstolen (the Swedish labour court) stated that the customer list of a company typically holds information with the characteristics of trade secrets. See also AD 2010 No 27, AD 2006 No 49, RH 2002:61, NJA 2001 p. 362, Svea Hovrätts (Svea Court of appeals) case 1997-05-14 (case T 81/96) and Svea Hovrätts decision 2010-12-29 Ö 7342-10.

⁶ AD 2003 No 21.

⁷ AD 1998 No 80 and AD 2006 No 49.

⁸ AD 2009 No 63.

production plans and business plan. The Swedish Supreme Court (Högsta Domstolen) has ruled that a bank's instructions for identification checks at cash withdrawals constitutes a trade secret.¹⁰

In the light of the abovementioned, Swedish law provides protection for all types of trade secrets, without any restrictions or limitation on which kind of information linked to a business that may meet the requirements for being a trade secret. Moreover, there is no particular requirement on the "quality" of information that constitutes a trade secret. It may be of an uncomplicated nature. It is not required that the idea is considered innovative or unique or likewise which can be a requirement for protection under intellectual property law.¹¹

Personal knowledge and experience of an individual is excluded because of the conditions "business or industrial relations". In the preparatory works, the following statements are made regarding this limitation:

"In principle, information which anybody with the relevant education could put into practice should be classified as information of the business or industrial relations of a person conducting business or industrial activities. However, where the information comprises knowledge and experience of an individual who cannot easily be passed on by way of instructions and directions, the information should be deemed to be of a personal nature and, accordingly, not as information concerning business or industrial activities that may be protected as trade secrets under the Act."¹²

The criterion "person conducting business or industrial activities" applies to all legal entities and individuals pursuing an economic activity professionally, for the purpose of profit-making or otherwise. Hence, confidential information merely connected to the private business of an individual may not be considered as a trade secret protected under the Act. It should be noted that information about a private business of an employers' representatives may be of a kind that would fall within the employee's duty of confidence as found under the general principle of loyalty.

The information shall be kept secret by the person conducting business or industrial activities

In order for the information to be classified as a trade secret, it is also required that the information is not in the public domain or in any other way generally accessible. In the preparatory works, it is stated that in order for trade secrets to be protected by the Act, it is essential that the information is not freely accessible to those wishing to access the material.

Further, the information must be treated as confidential by the trade secret proprietor. Hence, a duty of care and certain measures in order to keep the information confidential must be

⁹ RH 2002:11.

¹⁰ NJA 1995 p. 347. See also NJA 1999 p. 469, where Högsta domstolen (the Swedish Supreme Court) ruled that a banks' ten year old credit instruction constituted a trade secret.

¹¹ See also RH 2002:11.

¹² Prop. 1987/88:155 p.35.

taken by the party claiming protection of information under the Act.¹³ The individuals having access to the information must be limited and identifiable, which means that those who have received the information may only be authorised to use and disclose the information under certain restrictions connected to the purpose of the disclosure of a trade secret.¹⁴ This condition should however not be perceived as an absolute requirement of confidentiality undertakings, but the trade secret proprietor disclosing trade secrets to a third party must be able to demonstrate its intention to keep such disclosed information confidential.¹⁵

The disclosure of information shall be likely to cause damage to a person conducting business or industrial activities

The third and last condition is that the information, if used and/or disclosed, would likely adversely affect the competitiveness of the trade secret holder.¹⁶ This condition is to be evaluated in an objective manner. Hence, it is not required that the damages are proved in the particular case.¹⁷

Unwarranted violation of trade secrets under the Act

Section 2 of the Act states that the Act only applies to unwarranted violation of trade secrets.

Firstly, the Act is not applicable when someone discloses trade secrets containing information that, on valid grounds, reasonably may be regarded to be a criminal offence for which imprisonment may be adjudicated or another serious incongruity, for the purpose of revealing such wrongdoing or illegal activity (i.e. whistle blowing). Consequently, employees and other individuals may be allowed under the Act to disclose trade secrets of a trade secret proprietor in order to make public any incongruity. The right to disclose incongruities is, however, limited to circumstances where the incongruity is so severe that the public interest outweighs the need of protection for the proprietor of such information.¹⁸ Employees may only disclose or use a trade secret to the extent it is strictly necessary for the purpose of revealing such wrongdoing or illegal activity (i.e. whistleblowing). Furthermore the disclosure must in these cases be made before a public authority or other competent bodies, e.g. safety representatives and trade-union representatives to whom an employee is authorised to turn regarding serious incongruities.¹⁹

¹³ See Svea Hovrätts decision 2010-12-29 Ö 7342-10, where the Court stated that whether the information in a customer register can be found in other registers or otherwise available is without relevance to the question of keeping secret. The importance is the compilation of the information and that it has been kept secret.

¹⁴ Prop. 1987/88:155 p. 13.

¹⁵ Prop. 1987/88:155 p. 35 and the following.

¹⁶ See prop. 1987/88:155 p. 37, in which it was stated that the relevant consideration is where the disclosure causes economic loss or other to the person conducting business or industrial activities". E.g. see also Fahlbeck R, *Lagen om skydd för företagshemligheter: en kommentar och rättsöversikt*, p. 246 and the following, and the district court findings in AD 2011 No 11.

¹⁷ Prop. 1987/88:155 p.36-37.

¹⁸ Bet. 1989:90: LU37 p.30.

¹⁹ Bet. 1989:90: LU37 p. 90.

Secondly, the Act does not apply when a trade secret is acquired in good faith. As such, a company receiving a competitor's trade secret in good faith from the trade secret proprietor or a third party can therefore rely on the exception in Section 2, meaning that the trade secrets received under such circumstances are not protected under the Act. The same applies even if such company, later on receiving the trade secrets, becomes aware of the unauthorised disclosure or the status of the information being a trade secret of the trade secret proprietor.

Trade secrets in business relations

For the purpose of a business relation, parties are often required to exchange confidential information to each other in conjunction with the business relationship. Section 6 of the Act covers the protection of trade secrets disclosed in confidence in conjunction with such business relationships.

Liability for unwarranted violation of trade secrets in accordance to Section 6 of the Act demands that the following conditions are fulfilled;

- the trade secret is received in connection with a business relation;
- the trade secret is received in confidence;
- the trade secret is used or disclosed; and
- The use or disclosure is made with intent or negligence.

The prerequisite of a business relation does not imply contractual commitment. Hence, Section 6 of the Act is applicable even to information acquired during negotiations of contract, bidding procedures and presentations of a future co-operation or similar.²⁰

Section 6 of the Act applies to all types of business relationships where anyone receiving trade secrets in confidence. An individual who obtains the information should have had reason to understand that the information received had the character of trade secrets and that the information was given with the reservation that it was to be used only for a certain purpose. The relevant moment for this knowledge being the moment when the receiving party receives the trade secret and thus not the moment of the violation of trade secrets.²¹

Liability presumes that a person conducting business or industrial activities by intent or by negligence *uses or discloses* trade secrets received in confidence. These terms are defined in the preparatory works. The "use" is defined as anyone who within a business uses the information constituting a trade secret. The unwarranted use shall be of a commercial nature, but it is not required that the business makes a profit. The "disclosure" is defined as an

²⁰ Prop. 1987/88:155 p. 42, NJA 1998 p. 633 and RH 2002:11. See also Fahlbeck R, *Lagen om skydd för företagshemligheter: en kommentar och rättsöversikt*, p. 290 f.

²¹ There is a close connection between this condition and the definition of trade secrets. See Fahlbeck R, *Lagen om skydd för företagshemligheter: en kommentar och rättsöversikt*, p. 292.

individual disclosing the trade secrets to someone else.²² As indicated above, it is required that someone actively uses the trade secret in a business pursuing an economic activity professionally, for the purpose of profit-making or otherwise in order for liability to arise. Hence, the mere fact that someone is in possession of a trade secret, does not necessarily *per se* constitute a use according to the Act. It should be noted that there is no corresponding requirement regarding an unwarranted disclosure, meaning that there are no requirement that an unwarranted disclosure is carried out in connection to business pursuing an economic activity.

The non-use and non-disclosure undertakings provided for herein regarding trade secrets received in confidence in connection with a business relation applies without limitation in time provided, that such trade secrets meet the criteria of being a trade secret.²³

Trade secrets within an employment relationship

Employment imparts a duty of confidence on all employees irrespective of their position. Swedish case law provides that an employee is not entitled to disclose and/or otherwise misuse confidential information during the course of his/her employment.²⁴ The parties may also enter into an undertaking of confidentiality with express terms stipulated in a separate non-disclosure agreement, as part of the employment agreement or otherwise.²⁵ If the parties do not enter into an undertaking of confidentiality as aforementioned, the duty of confidence under the duty of loyalty for the employee will only last until his/her last day of employment.

In addition to the above, employees have, under certain conditions, a duty of confidence under Section 7 of the Act. According to this provision, an *employee, that intently or negligently*, makes unwarranted use or disclose a trade secret belonging to the employer that the employee has received in the course of his/her employment, under such circumstances that the employee realised or should have realised the status of the information being a trade secret, will be liable for damages caused by the violation of the Act. Liability for unwarranted violation of trade secrets in accordance to Section 7 of the Act requires that the following conditions are fulfilled;²⁶

- the employer is the trade secret proprietor;
- the trade secret is received by an employee in connection with the employment;

²² Fahlbeck R, *Lagen om skydd för företagshemligheter: en kommentar och rättsöversikt*, p. 296. See also prop. 1987/88:155 p. 47 and SOU 2008:63 p.173 and the following.

²⁴ E.g. see AD 1994 No 79, in which the Swedish labour court (Arbetsdomstolen) stated that duty of loyalty, includes a duty of confidence for employees, even if no such duty is set out explicitly in the employment contract or otherwise.

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²⁵ Fahlbeck R, *Lagen om skydd för företagshemligheter: en kommentar och rättsöversikt*, p. 315.

²⁶ See the judgement of Svea Court of appeals 1997-05-14, (case T 81/96).

Magnus Tonell 26/5/y 08:49

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- the employee understood, or ought to have understood, that it was not allowed to disclose the trade secret;
- the trade secret is used or disclosed by the employee; and
- the use or disclosure is made with intent or negligence.

The duty of confidence prescribed under Section 7 is significantly limited after the termination of the employment. In order to apply post-employment extraordinary circumstances must be at hand (Section 7, second paragraph). Consequently where a former employee uses trade secrets of its former employer, he/she will not be liable under the Act unless “extraordinary circumstances” are at hand.

According to statements made in the preparatory works to the Act, factors indicating “extraordinary circumstances” are:

- Where the employee has taken the position at the company with the purpose of acquiring trade secrets.
- Where the employee has gathered and compiled trade secrets and transferred documentation containing trade secrets during the employment with the purpose of subsequently setting up a competing business or to start working for a competing company.
- Where the employee holds a fiduciary position within the company.
- The extent to which the former employee’s use and disclosure affect the competitiveness of the former employer.

If the former employee is in breach of an express confidentiality agreement containing express post-employment confidentiality obligations, such agreement would also most likely indicate that “extraordinary circumstances” exists. It should however be noted that there are no definite case law concerning this specific question.

Liability of third party²⁷

Section 8 of the Act provides to some extent for protection against trade secrets misappropriation from third parties (i.e. outside the scope of a business relationship or an employer -employee relationship). Section 8 of the Act provides that anyone who with intent and without authorization uses or discloses a trade secret knowing that the information has been subject to unwarranted violation of trade secrets, may be liable to damages according to the Act. Liability for unwarranted violation of trade secrets in accordance to Section 8 of the Act requires that the following conditions are fulfilled:²⁸

- trade secrets are used or disclosed (i)

²⁷ Regarding liability for damages for anyone obtaining another person’s trade secrets outside of a business relation, see Section 6 of the Act, or employee-employer, see Section 7 of the Act.

²⁸ See the judgement of Svea hovrätt 1997-05-14 (case T 81/96) and AD 1998 No 80.

- trade secrets referred to (i) above have previously been violated in breach of the Act or/the Secrecy Act
- knowledge of the fact that the information previously has been violated in breach of the Act or the Secrecy Act; and
- the use or disclosure is made with intent or negligence;

The provision is applicable to situations where liability for damages²⁹ or criminal liability³⁰ are at hand according to the Act and/or the Secrecy Act.³¹ The most frequent situation in practice when Section 8 apply is when an ex-employee misappropriates the former employer's trade secrets in the recruiting employers business or its own start up business in close connection to the termination of the employment from the former employer/trade secret proprietor in breach of the Section 7 second paragraph when "extraordinary circumstances" at is hand.

Criminal liability

In addition to liability for damages according to the Act, a person who uses or discloses trade secrets of a trade secret proprietor can, under the same Act be held liable for a criminal offence provided that certain conditions are met. Anyone obtaining unauthorised access to a trade secret can be convicted of trade espionage. The offence is completed when such person obtains unauthorised access to the trade secrets of a trade secret proprietor.³² A prerequisite for liability of trade espionage for the perpetrator is that she/he had no authorised access to such trade secrets at the time of the unauthorised access. An active action is furthermore required.³³ Anyone who by accident obtain access to trade secrets cannot be convicted for trade espionage.³⁴ Trade secret proprietors with clear and express instructions on the handling of trade secrets can therefore extend the scope of the rule on trade espionage considerably. This can also be implemented by restrictions in access to trade secrets within an organization.

Anyone committing trade espionage can be sentenced to fines or imprisonment for not more than two years or, where the offence is grave, to imprisonment for not more than six years. It is however not necessary that the purpose of the unauthorised access was to use or disclose the trade secrets obtained through the unauthorised access.

Pursuant to Section 4 of the Act, anyone intently gaining access to trade secrets that have been subject to unwarranted violation of trade secrets and constitutes trade espionage can be sentenced to unauthorised tampering with trade secrets. Liability requires that the perpetrator knows that he or she got access to such trade secrets due to trade espionage

²⁹ Sections 6 and 8 of the Act.

³⁰ Sections 3 and 4 of the Act.

³¹ See the judgement of Svea Court of Appeal 1997-05-14 (case T 81/96).

³² Prop. 1987/88:155 p. 39.

³³ NJA 2001 p. 362.

³⁴ Prop. 1987/88:155 p. 39 and Helgesson (Wainikka) C, *Affärshemligheter i samtid och framtid*, p. 356.

and that the individual had knowledge of this fact at the time when it obtained the trade secret.³⁵

Anyone found guilty of committing unauthorised tampering with a trade secret may be sentenced to fines or imprisonment for not more than two years, or, where the offence is grave, to imprisonment for not more than four years.

In addition to the criminal liability as per above, a person convicted of an offence by reason of the aforesaid, can at the same time also be held liable for damages according to Section 5 of the Act corresponding to the actual damage incurred as a result of the trade espionage or unauthorised tampering with trade secrets.

Moreover, other than the duty of secrecy the Swedish penal code and the above described offences in the Act, the Swedish penal code includes several other criminal offences that may, depending on the circumstances, be applicable in connection with a person's unauthorised access to the trade secrets of a trade secret proprietor and/or misuse of such trade secrets.

Civil remedies

Damages

If a trade secret misappropriation is concluded, damages are available as a remedy under the Act. The general principle is that anyone who, by intent or by negligence, commits an unwarranted violation of trade secrets according to Sections 5-8 under the Act shall pay to the trade secret proprietor a compensation corresponding to the actual damage suffered.

The burden of proof is on the claimant.³⁶ However according to Chapter 35, Section 5 of the CJP, the courts may make an estimate of the damages to be paid if it is not possible to present full evidence of the extent of damage incurred. This rule is commonly applicable in trade secret cases since it can in many cases be very difficult to fully prove damage or loss caused by trade secret misappropriations.

Different methods of calculation of damages have been accepted in Swedish case law. Most frequent in practice are probably the following calculations methods³⁷:

- Loss of profit.
- Unjust enrichment
- Decrease in value of the company due to the violation of trade secret.

Other factors that may be of interest for the calculation of damages are the following:

³⁵ Helgesson (Wainikka) C, *Affärshemligheter i samtid och framtid*, p. 320.

³⁶ Prop. 1987/88:155 p. 49.

³⁷ See Tonell Sekretessavtal – och det rättsliga skyddet för företagshemligheter p. 109.

- The extent of the damage and the type of trade secret being subject to unwarranted violation of trade secrets³⁸
- Where the person suffering damage has an inferior status
- Willful violation of trade secrets may give rise to higher amount of damages than less serious violation of trade secrets.³⁹

The above mentioned methods of calculation should not be regarded as an exhaustive list of factors of importance to the estimation of damages, other factors may also be considered. In the preparatory works it is clarified that the calculation of damages in some cases may even need to be considered without fixed points and that, in some cases, the interest of keeping the information secret shall be taken into account.⁴⁰

Section 9 of the Act further provides that damages due to violation of trade secrets of trade secrets include the interest of the trade secret not being subject to unwarranted violation of trade secrets and other non-economic interests. Hence the trade secret proprietor may obtain damages for the moral prejudice suffered.

According to Section 10 of the Act, there is a five years limitation period counted from the time the damage occurred.

Other remedies

According to Section 11 of the Act, a court may, at the application of a person being subject to the violation of trade secret, under penalty of a fine prohibit the person who committed the unwarranted violation of a trade secret according to the Act to continue the use or disclosure of the trade secret. According to the Act, both legal entities and individuals may be adjudicated prohibition under penalty of a fine, presumed they are liable for the violation of trade secret.

The possibility of bringing an action for the adjudication of a fine to the Court, is an effective legal remedy to prevent the continuation of the violation. Prohibition of a fine is a particular sanction and complements the sanctions of penalties and damages and shall not be confused with a contractual penalty of a fine, which constitutes a separate sanction, as indicated above. Prohibition of a penalty of a fine is, mainly, a sanction to stop the continuation of the trade secret misappropriation.

A prohibition under penalty of a fine shall be based on anyone violating the provisions on damages or penalties of the Act. Both the subjective and objective criteria forming grounds for liability under the Act shall be met in order for the Court to adjudicate a prohibition under penalty of a fine. According to Section 2 of the Act, prohibition under penalty of a fine can be

³⁸ See the judgement of Svea Hovrätt 1997-05-14, (case T 81/96), in which the court of appeal made an assessment of the extent of the violation of trade secret when estimating the general damages.

³⁹ See RH 2002:11, in which court of appeal, with direct reference to the statements of the preparatory works, explicitly based the damages on willfulness.

⁴⁰ Prop. 1987/88:155 p. 50.

adjudicated only for unwarranted violation of trade secrets. Furthermore, prohibition under penalty of a fine can only be adjudicated as long as the status as trade secrets is kept.

According to Section 13 of the Act, an action for the adjudication of a fine can be combined with an interim claim for adjudication of a preliminary prohibition under penalty of a fine against any continuation of violation.

Section 14 of the Act provides that the Court under certain conditions, may order that documents or objects containing information that previously has been violated in breach of the Act. Furthermore the Court may alternately order that the document or the object instead shall be destroyed or altered to prevent further misuse of such trade secrets.

In the light of the abovementioned, the requirements of evidence in an action for the adjudication of a fine or surrender of documents are the same as in an action for damages.

Protection of trade secrets in Non-Disclosure Agreements

As there is no particular law on non-disclosure agreements, the general principles of contract law applies. In Swedish law, freedom of contract is the basis for the protection of trade secrets under contract law. All non-governmental legal subjects with legal competence can enter into various types of non-disclosure agreements. This applies for both parties in a business relationships as well within an employer – employee relationship. There are no formal conditions for the validity of Non-Disclosure agreements.⁴¹

In case of breach of the confidentiality obligations under Non-Disclosure agreements, remedies may be pursued under the general rules of breach of contract under contract law, including damages and under certain conditions, injunctive relief. According to general contract law, only economic loss is recoverable, which means that "non-economic loss" or damages for the moral prejudice incurred will not be compensated. However the parties may agree on liquidated damages for breach of confidentiality under a non-disclosure agreement.⁴²

In business relationships between corporations the parties in a non- disclosure agreement should be able to agree on confidentiality terms protecting certain information, even though such information should not meet the requirements of being a trade secret under the Act. Consequently, a trade secret proprietor should be entitled to remedies under the law of contract even if the information disclosed should not meet statutory trade secret standards (if not assessed to be unfair under Section 36 of the Swedish Act on Contracts (1915:218)). However, in the employer/employee relationship it is highly uncertain that an express confidentiality clause may protect information that would not be protected by the employee's duty of confidence under the principle of loyalty and/or being a trade secret under the Act.

⁴¹ See Tonell M Sekretessavtal – och det rättsliga skyddet för företagshemligheter p. 57 and the following.

⁴² See Tonell M Sekretessavtal – och det rättsliga skyddet för företagshemligheter p. 87 and the following.

Whether the Act limits the freedom of contract in these circumstances is, however, uncertain, since there is no definite Swedish case law in this area.⁴³

It should however be noted that the legal definition of a trade secret provided in Section 1 as well as the limitations mainly concerning whistle blowing under Section 2 of the Act are mandatory. Consequently, the scope of the Act cannot be extended by confidential undertakings covering “unprotected” information. The same applies to warranted disclosures made within the scope of Section 2 of the Act.

Which legal measures does a trade secret proprietor have at its disposal to secure evidence of trade secret misappropriation?

The Act does not provide for a specific system of discovery. Where trade secret misappropriation are suspected a trade secret proprietor has therefore to rely on the general procedural rules on securing evidence.

Chapter 38 Section 2 of the CJP (RB) stipulates that anyone, a party as well as a third party, who is in possession of a document of importance as evidence in a litigation may under certain circumstances be required by a court order to produce the document in question. An exception to the rule of producing documents is made for documents containing trade secrets. Pursuant to Chapter 36 Section 6 of the CJP, documents containing trade secrets may only be ordered to be produced if the Court finds extraordinary reasons to examine the document in question.

Chapter 15, Section 3 of the CJP (RB) may also apply. The provision states that where anyone shows a probable case for his claim, the Court may make an order for measures suitable to secure the applicant’s rights under certain conditions. In urgent cases the Court can make an ex parte decision.

Where there is a risk of loss of evidence, “proof-taking” for the purposes of securing evidence can be made. These rules are stated in Chapter 41 of the CJP (RB).

Protection of trade secrets during court proceedings

Chapter 5, Section 1 of the CJP (RB) provides that court hearings are, as a general principle, public. However, the Court may decide to hold the hearing behind closed doors, if it is presumed that information classified by the Court as strictly confidential, according to the Secrecy Act, will be presented during the proceedings.

Trade secrets submitted as part of a litigation in a general court may, on certain conditions, be classified as confidential. Chapter 36, Section 2 of the Secrecy Act, provides that in general court secrecy applies to information about an authority or a person’s business or industrial activities, if it is presumed that *substantial* damage will be caused to the person

⁴³ See Tonell M Sekretessavtal – och det rättsliga skyddet för företagshemligheter p. 60 and the following.

concerned by such disclosure.⁴⁴ The rule also applies when trade secrets are reproduced in pleadings and otherwise occur in the evidence brought forward to the Court.

The secrecy ordered by the Court in accordance with Chapter 36, Section 2 of the Secrecy Act, is limited to 20 years. This means that not even a court ruling on secrecy may be sufficient to protect confidential information of a commercial interest and value lasting longer than 20 years.

Where the information is considered not to fulfill the requirements of secrecy according to the Secrecy Act, the information is considered to be public information. When information disclosed during court proceedings is not considered a secrecy according to the Secrecy Act, the information is generally accessible and consequently no longer constitute a trade secret according to the Act.

When a court or another authority disclose information to a particular person, deputy, representative or assistant, in accordance to Chapter 10, Section 3 of the Secrecy Act, they can make a reservation on the disclosure and exploitation of the information. The reservation may not constitute a prohibition from using the information in a litigation or a case or to use it as verbal information to the other party, a deputy, representative or assistant, according to Chapter 10, Section 4 of the Secrecy Act.

⁴⁴ E.g. see AD 2011 No 11, in which the Swedish labour court (Arbetsdomstolen) decided the secrecy ordered by the district court to be valid, based on Chapter 43, Section 8, second paragraph of the Secrecy act and that secrecy according to Chapter 36, Section 2 of the same law should apply to the information in certain documents submitted in the case. See also RÅ 2002 note 157.