

# The Trade Secrets Directive—Finland

By Tom Groop

## 1. Trade Secrets Protection: Legal Framework

In Finland, the protection of trade secrets is governed by both the Finnish Trade Secrets Act (595/2018, the “FTSA”) and the Criminal Code of Finland (39/1889).

The FTSA which implements the Trade Secrets Directive (2016/943) entered into force on 15 August 2018 and contains the provisions of the civil framework of trade secret legislation in Finland, while criminal provisions remain in Chapters 30 and 38 the Criminal Code of Finland (39/1889).

A peculiarity of the FTSA is that it covers a broader scope than the Trade Secrets Directive, as it also covers technical models and directions which do not contain trade secrets. [This stems from the fact that these were also previously protected in the same act (the Unfair Business Practices Act, 1061/1978).]

## 2. Definition

The definition of a trade secret under Finnish law is very similar to Article 39 of the TRIPS Agreement and Article 2 of the Trade Secrets Directive, with some slight terminological differences. The term “trade secret” is defined in Section 2 of the FTSA as information:

- (a) which is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons that normally deal with the kind of information in question;
- (b) which has economic value in business activities owing to the characteristic referred to in Point a; and
- (c) the lawful holder of which has taken reasonable steps to protect it.

## 3. Lawful Acts

Pursuant to Section 3(4) of the FTSA, the acquisition of a trade secret is not unlawful if it is carried out by:

- 1) independent discovery or creation;
- 2) observation, study, disassembly or testing of a product or object that has been made available to the public or that is lawfully in the possession of a party who is free from any duty to limit the acquisition of the trade secret;
- 3) exercise of employees or employees’ representatives of their right to information and consultation; or
- 4) other practice in conformity with honest commercial practices than that referred to in paragraphs 1–3.

## 4. Unlawful Acts

Pursuant to Section 3(2) of the FTSA, the acquisition

of a trade secret is unlawful if it is carried out by:

- 1) appropriation;
- 2) unauthorized copying, reproduction, observation or other processing of any documents, objects, materials, substances or electronic files containing a trade secret or from which a trade secret can be deduced; or
- 3) other conduct contrary to honest commercial practices than that referred to in paragraph 1 or 2.

Pursuant to Section 3(3) of the FTSA, the acquisition of a trade secret is also unlawful if the person, at the time of the acquisition of the trade secret, either knew or ought to have known that the trade secret was obtained directly or indirectly from a person who was using or disclosing the trade secret unlawfully in a manner referred to in Section 4 of the Act.

Pursuant to Section 4 of the FTSA, a trade secret may not be unlawfully used or disclosed by a person having acquired the trade secret unlawfully in a manner referred to in Section 3(2) and 3(3). As set forth in Section 4(2), a trade secret may not be unlawfully used or disclosed by a person having obtained information about the trade secret:

- 1) when acting as a member of the supervisory board or board of directors, managing director, auditor or liquidator of an entity or foundation or in a role comparable to these;
- 2) in conjunction with enterprise restructuring proceedings;
- 3) when performing a task for another person or otherwise in a confidential business relationship;
- 4) in a manner other than that referred to in paragraphs 1–3 if bound by an agreement or obligation restricting the right to use or disclose the trade secret.

Furthermore, under Section 4(3) of the Act, anyone who has obtained information about a trade secret while employed by another may not unlawfully use or disclose that trade secret during his or her term of service.

Additionally, under Section 4(3) of the Act, a trade secret may not be unlawfully used or disclosed by a person who knows or ought to know that the trade secret was obtained directly or indirectly from a person who was using or disclosing the trade secret unlawfully.

Lastly, the production, offering or placing on the market of products infringing a trade secret and the importation, export and storage of products infringing a trade secret for those purposes shall be considered an unlawful use of a trade secret where the person

knows or ought to know that the product in question is a product infringing a trade secret.

## 5. Exceptions

Sections 5 and 6 of the FTSA set forth exceptions for unlawful acquisition, use or disclosure, including whistle blowing, exercising freedom of expression, as well as certain expressions in employment settings.

Section 5 stipulates that, notwithstanding the provisions of Sections 3 and 4, the acquisition, use or disclosure of a trade secret is not unlawful where the trade secret was acquired, used or disclosed for the purpose of protecting the general public interest to reveal misconduct or illegal activity. Nor is the acquisition, use or disclosure of a trade secret unlawful where it does not exceed what can be regarded as acceptable exercise of freedom of expression.

Section 5 stipulates that, notwithstanding the provisions of Section 4, the disclosure of a trade secret is not unlawful where an employee discloses a trade secret to a shop steward, elected employee representative or another representative of the employee under law or a collective agreement, where the disclosure of the trade secret is necessary for the performance of the representative's duties under law or a collective agreement.

## 6. Enforcement: Measures Procedures and Remedies

Section 18 of the FTSA sets forth a dual track jurisdiction system. Under the section, claims under private law referred to in the Act are considered by a District Court. However, a claim under private law against a legal person or a natural person carrying on a trade may also be considered by the Market Court in compliance with the provisions on such civil cases laid down in the Market Court Proceedings Act (100/2013).

Measures, procedures and remedies are set forth in Section 8 of the Act, which stipulates that a court of law may, at the request of the holder of a trade secret, impose a person who in a manner contradictory to provisions of Sections 3 or 4 has acquired or disclosed a trade secret or used it, with:

- 1) a prohibitory injunction to refrain from engaging in an act infringing a trade secret or from continuing or repeating an act infringing a trade secret;
- 2) a mandatory injunction to withdraw a product infringing a trade secret from the market or to have it modified or destroyed;
- 3) a mandatory injunction to destroy all or part of any documents, objects, material, substances or electronic files containing or embodying a trade secret or deliver up all or part of them to the holder of the trade secret.

An injunction concerning the disclosure or use of a trade secret may also be imposed on a person who has

obtained information about a trade secret in circumstances referred to in Section 4(2)-(4) (see answer to "Unlawful acts" above), where it is evident that he or she has taken measures for the unlawful disclosure or use of the trade secret.

An injunction or corrective measure may not cause harm to the respondent, the rights of others or public interest that is disproportionate to the interest protected and to other circumstances relating to the injunction request. A prohibitory or mandatory injunction shall be enforced by notice of a conditional fine (under the Act on Conditional Fines (1113/1990)) unless this is unnecessary on special grounds.

In addition to the above-mentioned measures and remedies, Section 11 sets forth the base for indemnity and damages. Under the Section, any person who intentionally or negligently uses a trade secret in violation of Section 4 of the Act is obliged to pay the holder of the trade secret a reasonable indemnity for the use of the trade secret as well as damages for any injury caused by the infringement. Additionally, any person who intentionally and negligently acquires or discloses a trade secret in violation of Sections 3 or 4 of the Act is obliged to pay damages to the holder of the trade secret for any injury caused by the infringement. If the negligence is slight, damages may be adjusted.

## 7. Preliminary Injunction

Under Chapter 7 Section 4(5) of the Code of Judicial procedure, if the matter concerns a civil action under the FTSA, the issue of the precautionary measure shall be heard by the general court or the Market Court where the proceedings on the main claim or right of the applicant are pending. If the hearing of the main issue has been concluded and the time provided for appeal has not yet elapsed, the issue of the precautionary measure shall be heard by the court that last dealt with the main issue. If no court proceedings are pending, the competent court is the court competent to hear the proceedings on the main claim or right of the applicant.

Under Section 9 of the Act, an injunction referred to in Section 8(1)(1), i.e. a prohibitory injunction to refrain from engaging in an act infringing a trade secret or from continuing or repeating an act infringing a trade secret, may be imposed on a preliminary basis whereby the injunction remains in force until a final decision has been taken on the matter. Where the injunction applies to the production, offering or placing on the market of alleged infringing products or to their

■ Tom Groop,  
Roschier, Attorneys, Ltd.,  
Senior Associate,  
Helsinki, Finland  
E-mail: tom.groop@roschier.com

importation, export or storage for those purposes, the seizure or delivery up of the products may be ordered in conjunction with the imposition of the injunction.

A preliminary injunction may be imposed where the applicant can demonstrate that it is probable that:

- 1) a trade secret exists;
- 2) the applicant is the trade secret holder; and
- 3) his or her right is being infringed or an infringement is imminent.

A preliminary injunction may not cause harm to the respondent, the rights of others or public interest that is disproportionate to the interest protected and to other circumstances relating to the injunction request. Regarding applying for, ordering and enforcement of precautionary measures, the provisions of Chapter 7 of the Code of Judicial Procedure (4/1734) and Chapter 8 of the Enforcement Code (705/2007) apply. However, where a preliminary injunction applies to the disclosure of a trade secret, provisions of the Enforcement Code regarding the possibility for the respondent to lodge a security instead of the precautionary measure does not apply.

## 8. Alternative Measures

Under Section 10 of the FTSA, a court of law may, at the request of the respondent, order the payment of compensation for use to the holder of the trade secret instead of ordering an injunction or corrective measures referred to in Section 8 if:

- 1) the respondent at the time of commencing the use of the trade secret neither knew or ought to have known that the trade secret was obtained from a party that was using or disclosing the trade secret unlawfully;
- 2) execution of the injunction or corrective measure would cause the respondent disproportionate harm; and
- 3) the compensation for use to the holder of the trade secret is assessed as reasonable.

Compensation for use shall not exceed the amount of royalties or fees due were the respondent authorised to use the trade secret for the period of time for which use of the trade secret could be prohibited.

## 9. Limitation Period

Under Section 13 of the FTSA, a claim concerning the imposition of an injunction or corrective measures shall be initiated within five years of the date on which the holder of a trade secret became aware of the infringement of the trade secret and of the infringer, but not later than within ten years of the date of the infringement.

The Section concerns only the limitation period during which an action regarding the injunctions and corrective measures set forth in Section 8 should be

initiated. Thus, the Section has no effect on *e.g.* the time limit for bringing an action for damages under Section 11. Such an action is governed by general limitation periods for claims for damages, *i.e.* three years from the moment the party suffering the losses knew or should have known about the damages and the responsible party. Such limitation period can be interrupted, but also this is covered by a maximum period of ten years.

## 10. Trade secrets as an Object of Property

In Finland, trade secrets may be subject to co-ownership, assignment and licenses.

## 11. Protection of Trade Secrets in Court Proceedings

The point of departure in Finnish law in general and the FTSA is that court proceedings, as well as trial documents are public. There are, however, exceptions to this rule, including the possibility to safeguard trade secrets by redacting confidential information from a judgment or ordering certain information in a piece of evidence to be kept confidential. Further, oral proceedings can under certain conditions be held without the presence of the public. The new FTSA also includes specific exceptions concerning the protection of trade secrets in court proceedings.

Under Section 14 of the FTSA, where the proceedings relate to unlawful acquisition, use or disclosure of a trade secret and a party is a legal person, the court may, at the request of another party, order that, when applying the Act on the Publicity of Court Proceedings in General Courts (370/2007) to a legal person, only a limited number of natural persons have the right of a legal person to be informed as a party about trial documents containing a trade secret, or take part in oral proceedings where a trade secret is presented.

The issue of the order is conditional upon the court having, in order to protect a trade secret, ordered that a trial document or its part be kept secret and decided to hold the oral proceedings wholly or in necessary part without the presence of the public. Additionally, it is conditional upon that access to the information ordered to be kept secret among a number of natural persons greater than the limited number would cause significant detriment or harm to the interests for the protection of which the information has been ordered to be kept secret.

Similarly, if the court's decision is ordered to be kept secret to the extent that it contains information relating to a trade secret and the number of natural persons within the legal person with access has been restricted as mentioned above, also the right of access as a party to a decision containing information to be kept secret may be restricted to apply only to a limited number of natural persons.

A request under Section 14 of the Act shall not,

however, be accepted if it could jeopardize the parties' right to a fair trial.

As can be seen in the wording of the Section, a prerequisite for the application of the Section is that the proceedings shall concern the unlawful acquisition, use or disclosure of trade secret, and the Section can therefore not be directly applied in other civil proceedings.

## 12. Recommendations for Corporate Trade Secrets Policies

Reasonable steps should be taken to ensure that trade secrets remain protected. In general, this could include measures to identify and mark trade secrets, HR procedures and agreements with both employees and third parties, as well as physical and organizational security safeguards and information security. In the preparatory works for the FTSA, it is set forth that the evaluation of whether sufficient steps have been taken must be determined on a case-by-case basis, and that the evaluation should take into account both *e.g.* the interest of the trade secret holder to keep the information secret, as well as the measures actually possible to be implemented in that situation. Measures recommended to be taken include, *inter alia*:

- Making sure that it is clear that the information is

of a confidential nature, through *e.g.* policies and communicated guidelines, as well as definitions in agreements. However, it should be noted that the legislative preparatory works specifically state that it is not required that documents containing trade secrets are expressly marked "confidential" in order to achieve this.

- Entering into non-disclosure agreements both with external business partners and employees that have access to the information. Such access should be kept limited, and trade secrets should be handled on a need-to-know basis.
- Employing sufficient security arrangements both in physical facilities and IT systems.

It should be noted that companies are allowed to agree on a wider definition of a trade secret than the definition included in the FTSA. However, in such a case, the parties would not be allowed to resort to the remedies set forth in the FTSA, but any misappropriation of such information would be viewed as a breach of contract. ■

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