

The Trade Secrets Directive—Sweden

By Magnus Friberg

1. Trade Secrets Protection: Legal Framework

The Swedish Act on Trade Secrets can be used both in civil or criminal proceedings. The Act contains criminal penalties, such as fines and/or imprisonment, while at the same time providing for civil actions claiming prohibitive injunctions under penalty of a fine and compensation for damages.

Anyone who intentionally and unlawfully prepares to access trade secrets shall be sentenced for corporate espionage to a fine or imprisonment for two years or, if the crime is severe, to jail for a minimum of six months up to six years. When assessing whether the crime is considered severe, particular consideration should be given to if the act has been of a particularly dangerous nature, has been of significant value or has meant very much noticeable damage. (Section 26)

Anyone who intentionally acquires a company secret with the knowledge that the one who provides the trade secret or someone before him/her in turn has acquired the trade secret in violation of section 26 may be sentenced to a fine or imprisonment for a maximum of two years or, if the crime is severe, to imprisonment for a maximum of four years. (Sec. 27)

Anyone who is in breach of Secs. 26 or 27 is liable for damages. (Secs. 5-11)

Any infringer may be subject to injunctions under penalty of a fine as well as such preliminary injunctions. (Secs. 12-21).

2. Definition

The definition in the Swedish Act is as follows:

Trade secrets refers to information:

1. about business or operating conditions in a trader's business or in a research institutions' activities,
2. which neither as a whole nor in the form of its parts have been arranged and put together are generally known or easily accessible to those who normally have access information of the kind in question,
3. as the holder has taken reasonable measures to keep secret, and
4. which disclosure is intended to cause harm to the proprietor.

Know-how acquired by a worker during normal occupation is not a trade secret. Nor is information about

something that constitutes a crime or other serious misconduct.

According to the Swedish legislature the definition is consistent with article 39 TRIPS Agreement and Article 2 of TSD.

3. Lawful Acts

The law applies only to unlawful infringements on company secrets. The following are not considered as unlawful infringements:

Where the trade secret is published or disclosed to an authority or other competent authority and which:

1. reasonably can expected to concern a crime which carries a prison sentence, or
2. may be deemed to constitute another misconduct and where the publication or disclosure takes place to protect public interest. (Sec. 4).

4. Unlawful Acts

Infringement of corporate secrets is defined as when someone without the proprietor's consent:

1. prepares to access, acquire or otherwise procure business secret,
2. exploits a corporate secrecy, or
3. discloses a corporate secret.

Exploitation or use of a company secret shall also include the manufacture of goods which design, characteristics, function, manufacturing or marketing benefit significantly from an infringed company secret. The same applies when someone offers such goods for sale, put them on the market, import, export or store such goods for such purposes. (Sec. 3)

5. Exceptions

The Exceptions in the Directive (Art. 5) are not expressed in the Swedish Act on Trade Secrets. The Swedish legislature has made the following comments with regard to the Exceptions of Art. 5:

- a) the Exception for exercising the right to freedom of expression and information as set out in the Charter, including respect for the freedom and pluralism of the media does not need to be expressed in the Act;
- (b) the Exception for revealing misconduct, wrong-

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doing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest is properly considered in other legislation;

- (c) the Exception for disclosure by workers to their representatives as part of the legitimate exercise by those representatives of their functions in accordance with Union or national law, provided that such disclosure was necessary for that exercise is properly considered in other legislation; and
- (d) the Exception for the purpose of protecting a legitimate interest recognised by Union or national law does not need to be expressed in the Act on Trade Secrets.

Much of this is also taken care of by the definition of unlawful infringements.

6. Enforcement: Measures Procedures and Remedies

The competent Court for the enforcement of trade secrets under the act is the court where the defendant is domiciled. Criminal proceedings are brought where the crime was perpetrated. Leave to appeal is needed for appeals to the Appellate courts.

7. Preliminary Injunctions

The competent Court for issuing PIs is the court where the defendant is domiciled. The plaintiff must show reasonable grounds; that it can reasonably be feared that the defendant continues the infringement and that is detrimental to the value of trade secret. On the corresponding conditions, a PI may be granted if and when an infringement is considered imminent.

A PI can be avoided if the defendant:

1. provides security for the compensation that he or she may have to pay to the proprietor, and
2. provided the continued exploitation does not cause the secret to be exposed.

8. Alternative Measures

A PI can be avoided if the defendant:

- provides security for the compensation that he or she may have to pay to the proprietor, and
- provided the continued exploitation does not cause the secret to be exposed.

9. Limitation Period

There is no set time limit on preliminary injunctions. However, if a proprietor remains passive while

knowing about the infringement this may be taken into consideration.

10. Trade Secrets as an Object of Property

Trade secrets can be regarded as intellectual property and therefore subject to co-ownership, assignment and licenses.

11. Protection of Trade Secrets in Court Proceedings

Sec 8 of the Trade Secrets Act does address this issue. According to Section 8, anyone who intentionally or negligently uses or discloses a corporate secret, which he or she has, as a party or a party representative, received due to a court decision, shall be liable for the payment of compensation for the damages caused.

If a party or party representative, in their turn, allows someone else access to the trade secret subject in a case, and that person intentionally or negligently utilizes or disposes of the trade secret, they shall be liable for damages caused. Anyone who intentionally or negligently utilizes or divulges a trade secret which he or she has accessed as part of a court hearing that has been held within closed doors shall be liable for compensation for the damages caused.

12. Recommendations for Corporate Trade Secrets Policies

The new law offers a wider scope of protection for trade secrets than the previous law and a company can seek compensation for damages in more cases than before. However, it is important to note that the new law requires activity from the company to protect its trade secrets. First, the information must not be widely known or available to a larger audience. This is nothing new, but secondly the company has to have adopted reasonable measures to keep the information secret. Examples of this is keeping the information restricted in the company on a need to know basis—password protected databases for example. The company should review and consider what information in the company it wishes to protect; limit access to this information; maintain awareness among employees about what are considered trade secrets and why it is important to protect them; and adopt a crisis management plan to be used in the event of infringements including a plan for recurrent follow-ups and assessments of the measures taken to protect the information. ■

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