



Trade Secret Protection

A Global Guide

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Switzerland

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1. Substantive aspects of both criminal and civil law

1.1 Legal theories and principal sources of law

Switzerland has a long tradition in the protection of trade secrets. Various provisions that are relevant in connection with trade secrets can be found in different laws, such as the Unfair Competition Act, the Criminal Code, employment law, data protection legislation and the Banking Act, as well as in regulations about contractual and quasi-contractual obligations. However, there is no general provision in Switzerland that defines ‘trade secret’ for all legal fields.

As a consequence of the diversity of legal provisions and definitions that deal with trade secrets, Swiss law does not follow one unique theory to protect trade secrets. Depending on the applicable provision, trade secrets are protected under the doctrine of tort law and/or as contractual obligations. Even if trade secrets can be categorised as intellectual property rights under certain circumstances, Swiss law does not provide protection for trade secrets in a way that is similar to other intellectual property rights such as patent rights, trademark rights, etc.

1.2 Qualification for protection

As mentioned above, Swiss statutory law does not provide a general definition of ‘trade secret’. Instead, the particularities of each provision of the Swiss law that governs the protection of trade secrets must be considered. Even so, Swiss courts and legal scholars have defined ‘trade secret’ in accordance with Article 39(2) of the TRIPs (Trade-Related Aspects of Intellectual Property Rights) Agreement as information that is neither evident nor commonly available. In addition, two additional requirements normally have to be met in order for a trade secret to be established: the owner of the trade secret must have a justified interest in keeping it secret (the so-called ‘objective interest’ to keep specific information or data secret); and the owner must have a practical interest in keeping such information or data secret (the so-called ‘subjective intention’ to keep such information and data secret).

Basically, any kind of information can be protected as a trade secret. For example, trade secrets may include commercially relevant information or data such as customer data, organisation data, and how prices are calculated, as well as fabrication processes and inventions.

Since there is no general definition of ‘trade secret’ in Swiss statutory law, the law sometimes distinguishes between business secrets (*Geschäftsgeheimnisse*) and

manufacturing secrets (*Fabrikationsgeheimnisse*), although the corresponding definitions are identical in some areas.

1.3 Assignment and transfer of trade secrets

Although there are no specific statutory provisions in Swiss contract law concerning the assignment or licensing of trade secrets, it is possible – and quite common – to assign secret know-how within a licensing (or know-how) agreement. These kinds of statutory non-defined agreement are founded on the principle of freedom of contract, according to which contracts are based on mutual agreement and free choice as long as not limited by other regulations.

Some authors distinguish between technical inventions as fabrication secrets (*Fabrikationsgeheimnisse*) and company-related secrets (*Beziehungsgeheimnisse*) such as, for example, price calculations. While it is clear that fabrication secrets can be exploited independently from the person or entity that has generated those secrets, this is normally not the case with regard to company-related secrets. For this reason, usually only technical information is assigned in licensing agreements.

1.4 Right to assert misuse of trade secrets

The proper parties of a civil action depend on the underlying basis of the claim. Under the Unfair Competition Act, for example, everyone affected by an act of unfair competition has the right to sue against such infringement. This might be the person or entity that originally generated the concerned trade secret, but also a licensee and – under specific circumstances – even consumers or government entities (Article 10 of the Unfair Competition Act).

In the field of employment law, the employer is entitled to defend its trade secrets in civil proceedings against (current or former) employees regardless of whether the employer has originally generated the trade secrets or has acted as a licensee.

1.5 Threshold for the breach of a trade secret

According to Article 162 of the Criminal Code, any person who betrays a manufacturing or trade secret that he is under a statutory or contractual duty not to reveal, as well as any person who exploits for himself or another such a betrayal, shall be subject to imprisonment (not exceeding three years) or to a monetary penalty.

Under Article 4(c) of the Swiss Unfair Competition Act, someone is deemed to have committed an act of unfair competition who, in particular, induces employees, agents or ancillaries to betray or pry into the manufacturing or trading secrets of their employer or principal.

In addition, anyone commits an act of unfair competition who exploits results of work entrusted to him – for example, tenders, calculations or plans – without the authorisation of the rightholder. The majority of legal scholars describe ‘entrusted results of work’ as those that are ‘not publicly available’ in the meaning of ‘not directly accessible’ – as, for example, in product descriptions. Other legal scholars equate the element of ‘result of work’ with the product put on the market and assume that Article 5(a) of the Unfair Competition Act applies only to the production

phase of the product and not after it has been put on the market (because it is then accessible for everybody and thus already part of the public domain).

Article 321a(4) of the Swiss Code of Obligations provides a kind of *de minimis* threshold since an employee whose employment contract has been terminated is only prohibited from exploiting or revealing confidential information possessed by his former employer to the extent required to safeguard the employer's legitimate interests (ie, after the termination of the employment contract not every dissemination or exploitation of a trade secret constitutes a material breach of the former employment contract).

The bank-client privilege in Switzerland (ie, Swiss banking secrecy) is also fortified by trade secret provisions: according to Article 47 of the Swiss Banking Act, a person who discloses a secret that has been confided to him in his capacity as a bank functionary, or whoever attempts to induce such a breach of professional confidentiality, will be punished by imprisonment or fine.

1.6 Direct and indirect liability for the breach of a trade secret

According to the principles of general liability law, where two or more persons have caused damage together, whether as instigator, perpetrator or accomplice, they are jointly and severally liable to the injured party (Article 50 of the Code of Obligations).

Moreover, Article 55 of that code states that an employer is liable for the loss or damage caused by his employees or ancillary staff in the performance of their work unless he proves that he took all due care to avoid loss or damage of this type or that the loss or damage would have occurred even if all due care had been taken.

Under Article 162 of the Criminal Code, only intentional acts of breaching trade secrets are punishable. The (intentional) aiding and abetting to breach a trade secret is, however, also covered by the Criminal Code.

As stated in section 1.5, according to Article 4(c) of the Unfair Competition Act someone is deemed to have committed an act of unfair competition who, in particular, induces employees, agents or ancillaries to betray or pry into the manufacturing or trading secrets of their employer or principal.

The aforementioned bases for claims in order to protect trade secrets under Swiss law (see section 1.5 above) do not punish what may be termed the innocent disclosure or exploitation of trade secrets.

1.7 Defences available

Besides attacking the nature of the trade secret at issue or denying its receipt, which are recognised as defences, the use of trade and business secrets is often the subject of disputes after the termination of employment contracts. During employment, according to Article 321a of the Code of Obligations, an employee must not exploit or reveal confidential information such as manufacturing or trade secrets. This obligation remains even after the termination of the employment relationship to the extent that the employee must not reveal such information to third parties. However, this obligation does not prevent the former employee from using the revealed trade secrets for his own purposes. To prevent this, there must be a non-

competition agreement between the parties, which must be limited in scope in terms of its subject as well as the territorial and temporal scope.

The argument of public interest is generally not applicable to the exploitation of trade secrets. Any negative impacts on competition, which might justify restriction, are subject to cartel law.

1.8 Liability of claimants

There are no specific provisions in Swiss civil law that sanction the unjustified assertion of claims. However, the Swiss Civil Procedure Code provides that the losing party of court proceedings is bound to pay the court costs as well as the prevailing party's attorney's fees (see section 3.7 below), so there is a financial penalty to making spurious claims.

If unfounded claims for breach of a trade secret are asserted, the claimant might be liable under the Unfair Competition Act for damages that have been caused to the defendant. Further, the action of threatening (unfounded) claims for breach of a trade secret may itself constitute an act of unfair competition, which could form the basis for actions for cease-and-desist orders as well as for damages. In Swiss legal practice such claims are, however, rarely the subject of court proceedings and therefore no clear legal standards have been developed so far.

2. Remedies under both criminal and civil law

2.1 Remedies for breach of a trade secret in a civil action

In civil law proceedings, permanent injunctions and financial compensation are available and are the most frequent remedies for the breach of a trade secret. Furthermore, the principle of restitution would generally also allow the recall of sold products as well as the destruction of remaining stocks that unlawfully make use of trade secrets. However, there is no settled case law concerning such claims for restitution in Switzerland, but claims for the destruction of products that illegally make use of trade secrets are available for objects seized under the Criminal Code.

The same approach might also be applied for criminal breaches of trade secrets under the Unfair Competition Act but would require a decision in criminal proceedings.

2.2 Remedies for extraterritorial activities breaching a trade secret

The Swiss Private International Law generally applies tort law, which is also applicable for the breach of a trade secret, and specifies that the courts at the place of residence of the defendant can have jurisdiction. Further, competence is provided for the courts at the place where the harm occurred and the place where the harm arose. Swiss courts therefore have jurisdiction if, for instance, a trade secret has been generated abroad but is exploited or used in Switzerland.

The applicable law depends on the basis of the claim that has been asserted. If the claim has its basis in the Unfair Competition Act, then Article 136 of the Private International Law provides that claims founded on an act of unfair competition are to be governed by the law of the state in whose market the effects of the unfair act occur.

2.3 Obtaining an injunction

The Civil Procedure Code generally provides the possibility of permanent injunctions against the violation of rights for civil law claims. Hence, it is possible to obtain such an injunction against a party to prevent the future breach of a trade secret under, for example, the Unfair Competition Act, or claims under employment or contract law. A major requirement for such an injunction is a legal interest of bringing proceedings by the claimant, which would be fulfilled by a risk that a trade secret is being infringed.

A permanent injunction would usually not be limited by any term or be subject to the condition that the trade secret still qualifies to be protected. However, any further developments in relation to the judgment may be considered during the process of enforcement and, according to Article 341 of the Civil Procedure Code, the enforcement courts should examine the enforceability of any judgment *ex officio*. If a court's judgment, for example, obliges the defendant not to use a specific technology because it has exploited the claimant's trade secret, the defendant might object any to enforcement activities of the claimant before the enforcement court if the concerned technology has become publicly available since the judgment.

2.4 Monetary remedies

While there are no punitive damages in Switzerland, monetary compensation is available for damages (lost profits), account of profits and unjustified enrichment (including reasonable royalties). To justify a damage claim there must be a damage that has been caused unlawfully by fault of the infringer. Further, there must be a causal connection between the act of the infringement and the damage. Less strict requirements apply with regard to accounts of profits and unjustified enrichment claims.

Concerning the general problem of calculating damages, the claimant can provide estimates to the court and the judge will appraise the existence and extent of the damage taking into account the usual course of such damages. Concerning an account of profits there are no strict rules as to how to determine the amount. This often leads to discussions about which expenses made by the infringing party can be deducted from the earnings.

If it is impossible or unreasonable to quantify the amount of damages at the start of the proceedings, the plaintiff may bring an action for an unquantified damage claim. Once evidence is taken or the required information is furnished by the defendant, the plaintiff must quantify the damage claim as soon as he is able to do so.

2.5 Restitutionary remedies

In Switzerland, as a civil law jurisdiction, there is no direct equivalent to the common law remedy of constructive trust. However, there are other legal remedies available for the owner of a trade secret to claim the enrichment of a party that has gained advantage through breach of a trade secret. The corresponding claims may be based on unjust enrichment (Article 62 and following of the Code of Obligations) or on claims for damages based on contractual obligations.

2.6 Remedies and sanctions available for breach of a trade secret under criminal law

Criminal sanctions are provided in particular in the Unfair Competition Act and the Criminal Code. Sanctions include imprisonment and/or a fine, the seizure of goods and the publication of the judgment.

Imprisonment up to three years or a fine is intended for whoever betrays a manufacturing or business secret that, according to a legal or contractual obligation, he should safeguard, or for whoever exploits such a betrayal (Article 162 of the Criminal Code).

Article 273 of the Criminal Code provides that whoever exploits a manufacturing or business secret in order to make it available to a foreign authority or a foreign organisation or private entity, or in order to use it for his own benefit, shall be subject to punishment.

Articles 320 and 321 of the Criminal Code provide a criminal sanction for persons in specific positions of official authority for the breach of a secrecy obligation or for private persons entrusted with a secret in their function, such as priests, attorneys-at-law, defence attorneys, notaries, auditors, doctors, dentists or pharmacists, and their auxiliary personnel.

According to Article 6 of the Unfair Competition Act, a breach of production and trade secrets for the offender's own use or use by a third party also constitutes unfair competition. However, the Unfair Competition Act requires that such production and trade secrets were illegally acquired. Hence, if an ex-employee does not take physical data with him when he leaves a certain employment, production and trade secrets are not illegally acquired. However, even if information is legally acquired (eg, the mere knowledge of very important information has arisen), the use of it can be a breach of the general rule of unfair competition, under Article 2 of the Unfair Competition Act, if the information is used in a very systematic and unfair way. Even so, a violation of the general rule of Article 2 of the Swiss Unfair Competition Act does not lead to criminal sanctions.

For criminal actions, if someone unlawfully makes protected personal data or personality profiles available, of which he obtained knowledge while performing his professional activities, Article 35 of the Swiss Data Protection Act provides a fine as a criminal sanction. Further, criminal sanctions are available in the case of an unlawful disclosure of secrets by banks and their organs, employees, agents or liquidators (Article 47 of the Swiss Banking Act).

3. Procedural aspects under both criminal and civil law

3.1 Enforcing trade secret rights in Switzerland

Swiss law does not protect trade secrets as such, but provides legal assistance against illicit actions infringing trade secrets.

Swiss law contains a number of civil sanctions in a case of trade secret infringement. There is the right to file for injunctive relief and permanent injunctions, as well as the entitlement to compensation of damages and/or an account of profits. Preliminary injunctions are also available.

Basically, three causes of action for monetary compensation are available:

compensation for damages; an account of profits; and unjustified enrichment. Compensation for damages is available if the owner of the trade secret can prove damages, unlawfulness, a causal connection between the illegal activities and the damages and fault on the part of the infringer. In relation to account of profits, the impairment of a third-party right (trade secret infringement), the infringer's profits – under certain circumstances a reduction of loss may instead suffice – the causal connection and bad faith on the side of the infringer need to be established. Further, the owner of the trade secret has an action for unjustified enrichment. The major part of the legal doctrine presumes that at least usual or adequate royalties for (illegal) use of a trade secret can be obtained. However, it is unclear whether any further profits of the infringer can be claimed and whether the counterplea that there is no enrichment left is applicable.

In addition to the civil remedies and actions just described, there are a number of criminal sanctions provided for in both the Unfair Competition Act and the Criminal Code. Parallel to imprisonment and/or a fine, the sanctions comprise seizure and the publication of the judgment.

Criminal prosecution is generally opened by a complaint from the injured party (Article 162 of the Criminal Code). Criminal conviction, however, requires evidence of all elements of the crime as well as the offender's intention.

The statute of limitation depends on the legal nature of the asserted claims. According to Article 60 of the Code of Obligations, civil claims for damages and satisfaction based on tort law lapse one year from the date on which the injured party became aware of the loss or damage and of the identity of the liable person. However, if the claim derives from an offence for which criminal law envisages a longer limitation period, that longer period applies also to the civil law claim. In any event, such claims must be forfeited 10 years after the date on which the loss or damage was caused. Claims in connection with work performed by employees for their employers – eg, claims resulting from breaches of secrecy obligations in employment contracts – become time-barred after five years, in accordance with Article 128 of the Code of Obligations.

3.2 Customs measures

There is neither a specific legal provision nor case law available for customs measures based on the misuse of a trade secret.

3.3 Courts for actions involving the breach of trade secrets

Unless the law provides otherwise, it is Swiss cantonal law that governs the substantive jurisdiction and procedural jurisdiction of the courts (Article 4(1) of the Civil Procedure Code). Depending on the basis of the claim and the legal nature of the involved parties (ie, private persons or commercial entities), actions for breach of trade secrets can be brought to the labour court, civil court, criminal court and/or commercial court provided that the chosen type of court exists in the respective canton (Article 6 of the Civil Procedure Code). In Switzerland, there are no specialised courts explicitly for trade secret matters. However, for civil litigation one of the four commercial courts might be recommended to claimants because of the commercial court's general expertise in commercial matters.

If the legal requirements for the claimed remedies are similar, Swiss courts normally duly take into account foreign decisions.

3.4 Procedure in civil proceedings

Ordinary civil proceedings are initiated by filing a statement of claim. The court serves the defendant with the statement of claim and at the same time sets a deadline for filing a written statement of defence. The court can order a second exchange of written submissions if the circumstances so require. The court may hold instruction hearings at any time during the proceedings. Instruction hearings are held to discuss the matter in dispute in an informal manner, to complete the facts, to attempt to reach a mutual agreement (ie, a settlement) and to prepare for the main hearing.

Pre-trial discovery is not permitted in Switzerland. However, the precautionary taking of evidence is possible pursuant to Article 158 of the Civil Procedure Code, which allows the court to take evidence at any time if the applicant shows credibly that the evidence is at risk or that it has a legitimate interest. The provisions regarding interim measures apply.

As a result of a reduced evidential value of their statements, party experts are not usually engaged; instead, court-appointed experts are used. At the request of a party or *ex officio*, the court can obtain an opinion from one or more experts. The court must hear the parties first.

Cross-examination of witnesses is usually not permitted.

The Civil Procedure Code requires from the parties and from third persons an active collaboration in the collection of evidence. This collaboration is a procedural obligation for the parties, whereas for third persons it is a procedural duty. The collaboration covers the behaviours listed in Article 160(1) of the Civil Procedure Code. Those provisions require that the statements made by parties and third persons/witnesses be truthful, and that the parties not only hand over relevant documents but also permit proprietary and personal inspections.

The collaboration can be declined if the party or a third person has a right to refuse such collaboration provided by Article 163 of the Civil Procedure Code. That code distinguishes between parties and third persons and between absolute and limited rights of refusal, and the latter rights are limited to the given matter, as for example the protection of specific secrets. In some cases, third parties have an absolute right of refusal (Article 165 of the Civil Procedure Code).

In summary proceedings (ie, in proceedings to request a preliminary injunction), the required level of proof does not need to be absolutely certain. It is sufficient that the court is objectively convinced as to the correctness of the claim and that any doubts the court has are not substantial or only slight.

3.5 Preliminary relief available

A general problem with pursuing claims involving the revealing of trade secrets is that such infringement might not be able to be completely remedied because, by its nature, the revealing cannot be undone.

Civil law claims are generally enforceable via preliminary injunction if a right has been violated or a violation is anticipated and if the violation threatens to cause not

easily reparable harm to the applicant. The main difference between interim injunction proceedings and ordinary proceedings on the merits are the shorter deadlines set by the courts in summary proceedings. Further, judicial vacations, which apply during Easter, summer holidays and Christmastime in ordinary proceedings on the merits in Switzerland, do not apply in interim injunction proceedings.

In cases of special urgency, and in particular where there is a risk that the enforcement of the measure will be frustrated, the court may order interim measures immediately and without hearing the opposing party. These rules also apply for civil law claims against violations of trade secrets. However, since the constitutional right to be heard is a principle that is highly respected by the Swiss courts, only few *ex parte* injunctions are in practice granted.

The civil procedure rules also provide measures for the court to take evidence at any time and even before the initiation of ordinary proceedings on the merits if the applicant shows that the evidence is at risk or that it has a legitimate interest in securing it (eg, for assessing the chances of success). The pre-trial taking of evidence might be ordered *ex parte* by the courts, and this normally happens more often than in preliminary injunction proceedings mainly because the pre-trial taking of evidence does not seem to hurt the concerned party as much as an injunction.

Criminal proceedings provide further remedies for collecting evidence by the authorities, such as house searches, and these means should be considered if any evidence is suspected to be in the control of an uncooperative defendant or is at risk of being destroyed.

3.6 Right to appeal

Decisions handed down by the court of first instance can be appealed to a court of second instance at the cantonal level, variously named depending on the respective canton. The main role of the court of second instance is to examine appeals against rulings made by the forum of first instance.

As an exception – for instance, in disputes falling under competition law or involving intellectual property rights – only one cantonal forum is provided. In addition, four cantons (Zurich, Berne, Aargau and St Gall) have established specialised courts of commerce. Decisions rendered by the sole cantonal forums or by the courts of commerce can only be appealed to the Federal Supreme Court.

The Federal Supreme Court's main role is to adjudicate appeals of rulings of the highest cantonal courts of appeals and of rulings by Swiss federal courts, in domains governed by federal law such as civil, criminal, administrative and constitutional law. The Federal Supreme Court will only review the application of federal law and, in a case of temporary or preliminary injunction, an alleged breach of constitutional rights. As a general rule, new evidence cannot be brought into the appeal proceedings and the Swiss Federal Court will only correct obvious mistakes in the assessment of the evidence.

With regard to employment-related complaints (eg, trade secret disputes between employers and employees), and depending on the place of jurisdiction and the amount in dispute, a specialised labour court, a court of first instance or a court of

second instance (if the claim amount is above Sfr100,000 (around €92,000)) will hear such complaints.

3.7 Legal costs

The losing party has to pay the court fees. In addition, the losing party has to pay the attorney's fees to the winning party. Those fees are normally calculated according to special tariffs established by the cantonal courts on the basis of the value in dispute. Costs are normally recoverable only at the end of proceedings.

4. General

4.1 Forthcoming legislation

As of now, there is no forthcoming legislation regarding trade secrets in Switzerland.

4.2 Trends and hot topics

There are no current developments to amend the legislation about trade secrets in Switzerland. However, the implementation of EU regulations often initiates new developments in Switzerland and the current legislative process for the new EU framework for the protection of trade (in particular, the draft EU Trade Secrets Directive dating from 2014) will be observed attentively in Switzerland.

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