

COMPENSATION FOR DAMAGES DUE TO BREACH OF TRADE SECRET

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THE CONCEPT OF TRADE SECRET

Trade secrets are confidential information that may be technical in nature, such as drawings and designs, prototypes, manufacturing processes, unpatented or unpatented inventions, know-how, formulas or recipes, genetic materials and fragrances. In order for the information to be considered as business secrets, it is necessary for them to meet the following requirements:

- (1) they are secret because they are not as a whole, or in terms of the structure and set of their constituent parts, generally known or easily accessible to persons who normally come into contact with such information in the course of their activities,
- (2) have commercial value because they represent a secret,
- (3) the person lawfully controlling them has taken reasonable steps in the circumstances to preserve their secrecy.

The category of business information that is kept secret does not always have to be information that could be qualified as trade secrets in terms of intellectual property. Namely, other types of confidential business information are included within the broader concept of trade secrets. Trade secrets and economic activities are inextricably linked and have existed since man began to earn economic gain.

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Through the obligation of the taxpayer to cooperate with the tax authority, to submit data for tax purposes, as well as to declare them, a space has been created for the taxpayer to reveal information and data from his personal, family and professional life. Hence, there is a need for legislation to protect taxpayers' rights to data confidentiality. Taxpayers in Serbia have the right to confidentiality of data.

In order to be considered trade secrets, the information in question must not be generally known to the public or to persons outside the company who have been informed of the substance of the information. For a trade secret to be truly a trade secret, the information must be confidential enough to provide real or potential economic and business advantage or benefit to the person who possesses the information.

A trade secret is any information that has commercial value because it is not generally known or available to third parties that could be of economic benefit by its use or disclosure, and which is protected by its holder by appropriate measures in accordance with law, business policy, contractual obligations or appropriate standards in order to maintain its secrecy, and the disclosure of which to a third party could harm the holder of a trade secret.

All trade secrets are confidential information. However, some business information will not reach the level of trade secret, but it can also be considered confidential. This may include those documents, physical objects, categories of documents that have been marked as confidential. Furthermore, these can be physical areas (parts of the building, rooms, cabinets, etc.) that are marked as confidential. Procedures, processes and methods, computer programs and all other information, objects, locations and other things that the company wants to treat in such a way - can also be marked as confidential.

The law provides a more precise definition of trade secrets in relation to the previous Law on the Protection of Trade Secrets, especially by introducing measures that the holder of trade secrets must take to preserve the secrecy of information.

The law defines this measure as "reasonable measures to preserve the secrecy of information", which include, among other, the drafting of an internal act on the handling of trade secrets and the circle of persons and their rights and obligations when handling trade secrets, or measures of physical or electronic protection of accessing and handling trade secret. In that sense, in relation to the earlier formulation of "appropriate measures" prescribed by the Previous Law, which was not precisely determined, the Law provides concrete examples, stating *exempli causa* what is considered to constitute reasonable measures. Despite the fact that the measures for maintaining the secrecy of information in the Law are just examples, it seems that the implementation of some of the listed measures by the secret holder in a possible dispute would facilitate proving that some information or



data is a trade secret. Another novelty of the Law is that it prescribes certain situations when it will be considered that obtaining, using and disclosing information considered a trade secret is legal:

- if the information was obtained through independent discovery, or
- by exercising the right of workers or workers' representatives to information and consultation in accordance with special regulations or regulations of the European Union, the General Law retains the general wording that obtaining, using and disclosing information will be in accordance with the law if done in good business customs.

Documents and data that represent a trade secret are technical and technological solutions and procedures applied in production (projects, research results, tests, samples, designs, models, inventions, patents and licenses, etc.) as well as data on the adoption of new and improvement of existing production, business policy programs, data on capacities, volume and structure of production, data on purchases of goods and data on possibilities of payment of obligations, on the state of debts and receivables, on loans and financial condition.

DESIGN/METHODS/APPROACH TRADE SECRETS AND PATENTS

Patent law is dedicated to the promotion of inventions, while ensuring the protection of socio-economic interests. The financial aspects of research and the lack of alternative investment protection impose the need for their patent protection (Damjanović, 2021: 457). Patent protection is expensive, especially the patent granting procedure which can take up to a decade! Inventors face the challenge of protecting an invention with a patent or keeping a trade secret? A secret carries with it the risk of discovery, and the inventor has no subjective right to it as in the case of a patent. The solution to this problem, which is most often applied in practice, is a combination of patents and trade secrets. Inventions are protected by a patent, and the accompanying technical knowledge, which does not meet the requirements for patent protection, is protected as a trade secret.

The conditions for the protection of an invention are novelty, inventiveness and applicability. Novelty is examined by comparing submitted patent to concrete, defined, technical solutions that are explicitly chosen from the overall state of technology, which means that the novelty is "overthrown" by the existence of one document or one product from the overall state of technology that has the same characteristics as the submitted invention. In determining the current state of technology, we can conclude from all of the above that the patent offices mostly limit



the volume and content of previous technology state to the subset of technology states that are defined in relation to the field of the invention. A patent can be acknowledged as an invention only in cases where the details of it were not previously published. Since institutional and personal work of researchers was until recently valued solely based on scientific work, publishing was considered more important than the attempt to provide patent protection. However, after submitting a patent, researchers can publish an invention without violating its patent protection. The research of the European Commission for Internal Market and Research shows that in most cases there is no postponement of publishing that could relate to the previous admission of the patent application; so, the practice of combining patents with publishing papers is increasingly applied (Damjanović, 2020: 326).

Filing patent applications and monitoring possible infringements involves significant costs. Therefore, companies with limited financial resources may choose methods of protection that require lower costs, such as secrecy. The most important reason why small start-ups and small high-tech companies refrain from patenting is the costs associated with it. Research based on UK data from 2013 found that companies that claim to have limited financial resources for innovation activities prefer secrecy over patenting, while larger companies often take advantage of patents. However, global legal and economic trends suggest that the growth in the use of trade secrets is outpacing the growth in patents.

Trade secrets play an important role in the exchange of knowledge between research institutions and companies, especially SMEs. They provide the most jobs and create new ones, making the greatest contribution in added value, turnover, profit and in the most developed economies and exports. Today, in the conditions of dynamic development competition, companies are looking for their chance to survive, grow and develop their business based on knowledge and skills, flexibility, inventiveness and speed of reaction to market signals and changes in the business environment. In this process, it is increasingly difficult for SMEs to develop in isolation, without cooperation with knowledge centers (universities, institutes, laboratories), advisory service providers, public institutions and at the same time with other SMEs, often joining various forms of business associations. Considering the different stages in the development of products or services and the number of actors in the business environment, intellectual property and its protection have an increasing weight in the daily operations of SMEs.

The current Law on the Protection of Business Secrets of the RS was adopted with the aim of ensuring adequate protection of business entities that keep certain business information secret from their unauthorized acquisition, disclosure or use. Unauthorized publication or use of this information may cause serious material damage to economic entities. It is also used to protect inventions during the patent application process, as well as non-patent or non-patentable data (e.g.



lists of business partners and clients, business strategies, advertising campaign strategies, etc.).

The issue of trade secret protection in the European Union (EU) was the responsibility of national legislations, whose solutions differed from each other, even to a significant extent. The unequal level of trade secret protection in the single market is not conducive to legal certainty, which is why the European Commission prepared and in 2013 adopted the Proposal for the Directive on Trade Secrets. The main goal that the Commission had in mind when drafting the aforementioned proposal is to standardize the national regulations of the member countries with regard to two key issues: determination of business secrets and minimum means of protection. The proposal of the European Commission was adopted on June 8, 2016 in the form of Directive 2016/943 of the European Parliament and the Council on the protection of undisclosed knowledge and experience and business information (trade secrets) from illegal acquisition, use and disclosure. that globalization, mass use of electronic communications as well as increasingly long supply chains are the causes of increased risks of illegal acquisition, abuse and disclosure of trade secrets. Such abuse harms the legitimate holders of trade secrets because they cannot benefit from innovations that they were the first to come up with (Jovicic, 2018:13).

The Directive provided for a two-year period within which member countries were obliged to implement the provisions of this Directive in their legislation, which they did by implementing provisions on trade secrets into already existing laws or by passing special laws. Thus, Austria added a number of new provisions for the implementation of the Directive to the already existing Unfair Competition Act. The new provisions require companies to take appropriate measures to protect trade secrets from disclosure and in order to take advantage of the expanded catalog of sanctions introduced by this act, which means that companies must recognize their knowledge and practices and take active steps to protect them, such as to ensure that employment contracts contain an obligation of confidentiality after employment. Belgium has also implemented these provisions in already existing laws (The Code of Economic Law, The Judicial Code and The Act on Employment Contracts) in such a way that it defined business secrets, legal and illegal actions in connection with trade secrets and products dealing with violations of the law and introduced certain protection measures. Bulgaria, the Czech Republic, Poland and Italy followed this example, i.e. the implementation of provisions from the Directive into already existing laws and regulations, while member states such as Germany, Hungary, the Netherlands, Luxembourg, Croatia and, as we have already mentioned, our countries, adopted new laws on the protection of trade secrets, which regulated the very definition and character of trade secrets, provided for the measures that holders of trade secrets must take



in order to protect them, as well as the protection procedure itself and the means available to them in order to protect trade secrets (<https://advokatskafirmasajic.com/blog/bs/zastita-poslovnje-tajne-u-skladu-s-direktivom-eu-2016-943-i-pozitivnim-propisima>).

FINDINGSEAL FRAMEWORK FOR THE PROTECTION OF BUSINESS SECRETS

Jurisprudence and legal doctrine have different views on whether the protection of trade secrets should be implemented within the framework of contract law, or within the framework of property and even criminal law. The answer to this question regularly starts from the fact that trade secrets are part of the most valuable assets of legal entities and that the law should protect these assets in order to prevent those who have abused the trust of trade secret holders from obtaining economic benefits. Therefore, the first explanations for the legal protection of trade secrets refer to abuse of trust, and bearing in mind that the violation of trade secrets most often refers to the employment relationship, this trade secret should be considered a breach of contract.

However, the protection of trade secrets goes beyond the relationship between the employer and the employee, because the injury can be caused by a third party who obtained the secret illegally, for example by theft. In this regard, there have been opinions that the right to professional secrecy should be protected as a property right. However, the trade secret right cannot be treated as a classic property right, rather it is more of an intellectual property right. It is, however, significantly different from patent rights, similar to copyright, which protects certain intellectual creations from unauthorized copying. If the invention qualifies for patenting, the company will be faced with a choice: keep the invention as a trade secret, protect it with a patent, or ensure that no one else can patent it due to its disclosure to the public.

The trade secret is the result of many years of research and investment by legal entities. Very often, trade secrets and confidential information are their most valuable assets, which is why they make significant efforts to protect them from competitors, corporate insiders, hackers, suppliers and disgruntled employees. The fact that the violation of trade secrets is more frequent indicates an increase in the number of requests for their legal protection. Systematic evidence of the value of trade secret theft for an advanced settlement-based economy puts the value of annual theft on the order of 0.0005 percent of US GDP (about \$100 million on a 2020 US GDP of about \$20 trillion) Many analysts who have as their subject of analysis the theft of business secrets, believe that the real figure is much higher and amounts to about one to three percent of GDP. (Ciuriak, Ptashkina, 2021: 11)



Factors in the increase in trade secret litigation include the increasing use of digital technology, increased labor mobility, the growing value of intellectual property, including trade secrets, increasing international threats, but also the enactment of trade secret laws and the willingness to seek protection.

The protection of trade secrets in the Republic of Serbia is regulated by the Law on the Protection of Trade Secrets, which determines in which cases the acquisition, use and publication of a trade secret is considered legal, and in which cases illegal. In addition to this law, the protection of trade secrets is realized within the Law on Business Companies, while the Criminal Code makes the disclosure of trade secrets a criminal offense.

Protection is most often achieved before the court in proceedings in which it is determined whether the information whose protection is sought is a business secret, but also whether measures have been taken to protect it. A request for judicial protection implies that one party requests the protection of rights from the court, and the court orders the other, against her will, to do or not do something, in order to protect the violated or threatened rights (Petrović, 2020: 257). The proceedings before the court are initiated by the action of the holder of the trade secret. A lawsuit may require;

- determination of violations;
- termination of infringement, or, depending on the case, prohibition of use or disclosure of trade secrets;
- prohibition of production, offering, placing on the market or use of infringing goods, or prohibition of import, export or storage of infringing goods for the purpose of production, offering, placing on the market or use of goods;
- determining appropriate measures in relation to the infringing goods, including the withdrawal of the goods from the market, the removal of property representing the infringing goods or the destruction of the infringing goods, or if justified, their withdrawal from the market, provided that the withdrawal of the goods does not endanger protection of business secrets to which the action relates;
- destruction in whole or in part of documents, objects, materials, substances or electronic documents that contain a business secret or which represent a business secret or, if necessary, hand over these documents, objects, materials, substances or electronic documents in whole or in part to the plaintiff.

The lawsuit is filed within one year when the holder of the trade secret became aware of the violation of the trade secret, i.e. no later than within five years from the date of the violation or from the date of the last violation if the violation was committed continuously. The lawsuit may demand compensation for damages and the exclusion of the person who violated the obligation to keep secrecy, if that



person is a member of the company. Filing a lawsuit therefore does not exclude the possibility of termination of the employment relationship in accordance with the law governing the employment relationship. The filing of a lawsuit and initiation of court proceedings by entities whose rights have been violated or threatened is realized in conditions where the expected value of the lawsuit is greater than the costs of the court proceedings. In addition to this basic condition, numerous factors influence the initiation of the decision-making procedure and the choice of the parties to the dispute to resolve the dispute through the courts (Petrović, 2020: 261). The law stipulates that the license holder is actively legitimized to file a lawsuit, if he is authorized to do so based on the contract or the law.

In addition to the lawsuit, the law also provides for a fine for an economic offense. Violation of trade secrets will be sanctioned as a commercial offense if it is committed by a company or a responsible person in it. The range of the fine is from 100,000 to 3,000,000 dinars for a legal entity, while the amount of the fine is from 50,000 to 200,000 dinars for the responsible person in the legal entity. In the case where the injury was caused by a person, it is treated as a misdemeanor and is punishable by a fine of 20,000 to 150,000 dinars (Article 21 of the Law on the Protection of Business Secrets).

Given that the illegal disclosure of a trade secret can have a very negative impact on the economic and other interests of the trade secret holder, it is possible for the court to order temporary measures if the trade secret holder makes it probable that the trade secret has occurred, or will occur.

TRADE SECRETS IN COMPARATIVE LEGISLATION

The protection of trade secrets within the legislation of EU member states is realized within the framework of the law on unfair competition, criminal, civil and other laws, and only in a small number of countries also the law on the protection of trade secrets. The forms and range of penalties provided for by law differ, which will be discussed in more detail later in the paper.

There is no special trade secret law in German law, but trade secrets are protected by various laws and regulations (German Unfair Competition Act (UWG), German Criminal Code, German Fiscal Code, German Civil Code (BGB) and other laws). An important role in the protection of trade secrets in Germany is played by the Federal Office for Cartels (FCO), which has special powers to protect trade secrets from disclosure and can impose fines of one million euros for natural persons, up to 10% of the last total turnover, as part of the misdemeanor procedure for companies in cases of serious violations. For minor violations, the fine is up to 100,000 euros.



In Portugal, in accordance with Article 331 of the IPC, in case someone commits an act of unfair competition, including the disclosure of confidential information, he is punished with a fine of 3,000 to 30,000 euros in the case when the offense was committed by a legal entity or from 750 to 7,500 euros if it is an individual. In addition, the violation of a trade secret can be the basis for civil lawsuits for damages, for the initiation of which it is necessary to prove the existence of a trade secret violation, the damage caused, but also the cause-and-effect relationship between the disclosure of information and the presumed damage (Articles 487 and 563 of the Civil Code).

In Polish legislation, the violation of trade secrets is listed among the offenses that fall under the Law on Liability of Collective Entities for Prohibited Acts (Article 16 of the Law on Liability of Collective Entities for Prohibited Acts). A fine ranging from PLN 1,000 (approx. EUR 237) to PLN 5,000,000 (approx. EUR 1,186,515) can be applied in case of criminal liability of the company. However, such penalty cannot exceed 3% of the company's revenue in the fiscal year in which the offense occurred.

In Romania, fines of 5,000 RON to 50,000 RON are provided for trade secret violations that fall under the Law on Unfair Competition, when trade secret violations are committed by legal entities, and from RON 5.00 up to 10,000 RON when it was done by a natural person (Article 4(1)(2) of the Law on Unfair Competition).

In Austria, the Cartel Court plays a significant role in the protection of trade secrets, which can impose a fine of up to 10% of the total turnover of the company in the last financial year of the company (or association of companies) that committed the violation.

The Greek Criminal Code punishes breach of trust with a prison sentence of three months to 10 years; breach of an official secret which refers mainly to state and non-business secrets with a prison sentence of at least three months or, if the breach is committed with the intention of obtaining benefit or advantage for another, a prison sentence of at least one year and a fine of 100,000 to 500,000 euros. The law also provides for a penalty for breach of trade secrets, which refers to secrets entrusted to lawyers, doctors, notaries, etc. due to the nature of the work, fines from 150 to 15,000 euros or imprisonment from 10 days to one year.

The above shows that the penalties for breaching trade secrets are high, which should have a preventive effect due to reduced willingness of individuals to potentially violate trade secrets.



ORIGINALITY/VALUED DAMAGES DUE TO BREACH OF BUSINESS SECRETS IN THEORY AND PRACTICE

The existing legal regulations in the Republic of Serbia enable adequate protection of business secrets and achieving protection requires effective application of legal rules. For the violation of a trade secret, that is, the illegal acquisition, use or disclosure of a trade secret, the holder of the trade secret or the licensee may demand compensation for damages caused by the violation from the person who committed the violation (Article 8 Law on the Protection of Trade Secrets). Damages mean loss of property value, loss in general, missed pleasure or inconvenience experienced.

The holder or licensee has the right to compensation for material and non-material damages if the person who violated the trade secret knew or should have known that he was participating in the illegal acquisition, use or disclosure of the trade secret (Article 8, Law on the Protection of Trade Secrets). Material or property damage can be manifested as ordinary damage or as lost benefit (Article 189 of the Law on Obligations). Ordinary, real (*damnum emergens*) or simple damage is the reduction of the damaged property caused by the illegal action of the damaging party, which can be manifested in action or inaction. Thus, the pest can cause damage intentionally or carelessly, while inaction can cause damage if the assumed obligation is not fulfilled. Ordinary damage occurs to the property, rights or personality of the person who suffers the damage. The scope of the damage is determined by comparing the value of the property before and after the damage and includes the value of the property for which the injured party was impoverished after the harmful act (Radišić, 2017: 221). Lost benefit (*lucrum cessans*) represents the profit that the injured party would have achieved if the damage had not occurred. It is not about reducing the existing property, but about preventing its increase in the future, which would have happened according to the regular course of events, if no harmful event had taken place.

While material or property damage refers to what the injured party has, non-property damage refers to what the injured party is: his life, health, honor and reputation, dignity, name, physical and psychological integrity. Violation of any of the listed non-property rights constitutes non-property damage. Non-property damage can be caused by injury to the body, destruction of things or an attack on moral property that is not an integral part of bodily integrity (Stanković, 1978: 483). Non-material damage can be caused by the execution of a civil tort, violation of a contractual obligation or violation of a pre-contractual obligation in accordance with the principle of conscientiousness and honesty. Therefore, non-property damage can be considered either in terms of non-contractual rules or according to contractual rules, or according to pre-contractual liability rules for damage (Baretić, 2006: 461-500). The recognition of the right to compensation



for non-material damage is based on the substantive legal assumptions of the existence of physical pain and psychological suffering inherent in natural persons. Given that a legal entity is unable to endure such pain and suffering, there is no legal basis for a claim for non-material damages (Петровић, 2019: 95).

Compensation for non-material damage (moral damage) due to the violation of a trade secret is not provided for in the legislation of all EU member states. Thus, compensation for non-material damage on this occasion can be requested in Bulgaria, the Czech Republic, the Netherlands, Hungary, Portugal, Greece, France, Italy, Latvia, Luxembourg, Slovakia, Sweden. The criteria for determining the amount of non-material damage compensation differ. In Italy, it is determined by the court on an equitable basis, while in Hungary, the courts take into account several factors when determining non-material damage: the severity of the injury, the degree of responsibility, the impact of the injury on the injured party and whether the offence was committed once or not more than once.

The number of cases in which compensation for non-material damage was awarded is not large. We highlight one in which the Supreme Court of Greece ordered the defendants to pay moral damages to the plaintiff because their conduct damaged the plaintiff's commercial reputation and trust. The plaintiff was a company engaged in the production of pastries, import and retail in the country and abroad. The company had invested a lot of effort and done extensive research to create a significant distribution and customer network in Greece. A confidentiality agreement was concluded with the first defendant whom she hired as a sales manager for an indefinite period of time for the duration of the employment relationship and two years after its termination. The contract stipulated that in case of breach of contractual obligations, the employee will have to compensate the employer for damages and lost profits. After 10 months of employment, during which the employee was familiar with the business secrets of the applicant, the employee left the company and was employed by a competing company (the second defendant) to whom he disclosed the key business secrets (list of foreign suppliers, list of clients, invoices) of the former employer. Having this information, the second defendant approached all of the plaintiff's customers and obtained favorable prices from its suppliers (prices with the same discounts as those given to the plaintiff). The plaintiff filed a civil action seeking 200,000 euros to be awarded for non-pecuniary damage (and reserved the right to claim actual financial damages).

The Supreme Court determined that the submitted claims and evidence are sufficient to prove that the tort (which is also a criminal offense under the same provisions) of illegal communication (by the first defendant) and illegal use of trade secrets (by the second defendant) are sufficient grounds for recognizing moral damages. Since the Supreme Court was not competent to calculate and award damages, the dispute was returned to the Court of Appeals for reconsideration.



Increasingly frequent requests for compensation for damages due to trade secrets and exercising the right to compensation in court proceedings contribute to the development of judicial practice in this area and represent the basis for the improvement of legislation.

CONCLUSION

The main driving force of companies to innovate is the expectation that an improved product or process will allow them to increase their profit. The realization and completion of the innovation is not a guarantee that the profit will be made. In order to reap the fruits of its labor, the company must protect the innovation and disable competitors, but also others who can abuse the information that present business secrets. The country's prosperity depends on research and development in the commercial world and the protection of intellectual property, including trade secrets, is one of the vital contributions to that goal. However, only a subset of trade secrets is potentially patentable; care should be taken that the trade secret policy is not based on an implicit relationship with patents. Instead, trade secrets should be considered in the context of their broad scope of applicability, their interaction with process, product, marketing and organizational innovations, and their appeal to different sectors. Awareness of the importance of trade secrets is increasing and business support in this area could encourage the effective use of trade secrets and enhance their positive innovation impacts. Adequate protection of secret affairs contributes to this, which implies the effective application of existing laws and their continuous improvement.

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