

---

## The Trade Secrets Act<sup>1)</sup>

WE MARGRETHE THE SECOND, by the Grace of God Queen of Denmark, make it known:

The Folketing has passed and We have confirmed by Royal Consent the following Act:

### Chapter 1

#### *Scope and definitions of the Act*

1. This Act contains rules on protection against illegal acquisition, use and disclosure of trade secrets.
2. Definitions used in this Act:
  - 1) 'Trade secret': Information that
    - a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with this kind of information,
    - b) has commercial value because it is secret, and
    - c) under the circumstances, has been subject to reasonable measures to keep it secret by the person lawfully in control of the information.
  - 2) 'Trade secret holder': Any natural person or legal entity lawfully controlling a trade secret.
  - 3) 'Infringer': Any natural person or legal entity that has unlawfully acquired, used or disclosed a trade secret.
  - 4) 'Infringing goods': Goods with design, characteristics, function, production process or marketing that significantly benefits from trade secrets unlawfully acquired, used or disclosed.

### Chapter 2

#### *Acquisition, use and disclosure of trade secrets*

3. The acquisition of a trade secret shall be considered lawful when the trade secret is obtained by any of the following means:
  - 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 the acquirer of the information who is not subject to any legally valid duty to limit the acquisition of the trade secret,
  - 3) exercise of the right of workers or workers' representatives to information and consultation in accordance with EU law and national laws and practices, or
  - 4) any other practice which, under the circumstances, is in conformity with honest commercial practices.

(2) The acquisition, use or disclosure of a trade secret shall be considered lawful to the extent that such acquisition, use or disclosure is required or allowed by EU or national law.

4. The acquisition of a trade secret without the consent of the trade secret holder shall be considered unlawful when the trade secret is obtained by any of the following means:

- 1) unauthorised access to, appropriation of, or copying of any documents, objects, materials, substances or electronic files that are lawfully under the control of the trade secret holder and which contain the trade secret or from which the trade secret can be deduced, or
- 2) any other conduct which, under the circumstances, is considered contrary to honest commercial practices.

(2) The use or disclosure of a trade secret without the consent of the trade secret holder shall be considered unlawful whenever the trade secret is used or disclosed by a person who has:

- 1) acquired the trade secret unlawfully,
- 2) breached a confidentiality agreement or any other duty not to disclose the trade secret, or
- 3) breached a contractual or any other duty to limit the use of the trade secret.

(3) The acquisition, use or disclosure of a trade secret shall also be considered unlawful whenever a person, at the time of the acquisition, use or disclosure, knew or ought to have known under the circumstances that the trade secret had been obtained directly or indirectly from another person who was using or disclosing the trade secret unlawfully pursuant to (2).

(4) The production, offer to sell or marketing of infringing goods, or the importation, export or storage of infringing goods for those purposes, shall also be considered an unlawful use of a trade secret if the person carrying out such activities knew, or ought to have known under the circumstances that the trade secret was used unlawfully pursuant to (2).

#### *Exceptions in the event of disclosure*

5. An application for the precautionary measures, procedures and remedies according to Sections 8, 12, 13 and 15 shall be dismissed if

- 1) acquisition, use or disclosure was carried out for exercising the right to freedom of information and expression, including respect for the freedom and pluralism of the media,
- 2) acquisition, use or disclosure was carried out for revealing misconduct, wrongdoing or illegal activity, provided that the defendant acted for the purpose of protecting the general public interest, or
- 3) this is a case where workers disclosed the trade secret to their representatives as part of these representatives' legitimate exercise of their functions, in accordance with EU or national law, provided that such disclosure was necessary for exercising the respective functions.

### Chapter 3

#### *Protection of trade secrets during legal proceedings*

6. Any person employed or that has been employed in a public service or profession and that is party to legal proceedings concerning unlawful acquisition, use or disclosure of a trade secret, or that has access to documents that form part of such legal proceedings, can be held criminally liable according to Sections 152-152 f of the Penal Code for the unauthorised use or disclosure of trade secrets or alleged trade secrets that they have become party to as a result of participation in the proceedings or access to documents that the court has identified as confidential. This shall not, however, apply if the court has ruled that such information is not covered by Section 2 (1) or if such information is generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question.

(2) The precautionary measures, procedures and remedies referred to in (1) shall apply correspondingly to lawyers and their authorised clerks, partners and personnel as well as others employed in the law firm.

(3) Any person who, without being covered by (1) or (2), is party to legal proceedings concerning unlawful acquisition, use or disclosure of a trade secret, or has access to documents that are part of such legal proceedings and who, without authorisation, uses or discloses trade secrets or alleged trade secrets that they have become party to as a result of participation in the proceedings or due to access to documents that the court has identified as confidential shall be punishable by fines. This shall not, however, apply, if

the court has ruled that such information is not covered by Section 2 (1), or if such information is generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question.

**7.** When a court makes a decision in cases on unlawful acquisition, use or disclosure of a trade secret, according to Chapter 2, Chapter 3 a and Section 339 a of the Administration of Justice Act, the court shall take into account

- 1) the need for ensuring access to effective legal remedies and to a fair trial,
- 2) the legitimate interests of the parties and relevant third parties, and
- 3) any injury the parties and relevant third parties may suffer as a result of a request on granting or rejecting such precautionary measures.

## Chapter 4

### *Provisional decisions on prohibitions and injunctions*

**8.** In cases on unlawful acquisition, use or disclosure of a trade secret, the court can apply prohibition or injunction, upon application from the trade secret holder, in accordance with the rules in Chapter 40 of the Administration of Justice Act, however cf. (2) and (4).

(2) The court can apply prohibition or injunction according to (1) if the party applying for a prohibition or injunction can prove or prove it likely, that

- 1) a trade secret exists,
- 2) the claimant is the trade secret holder, and
- 3) the trade secret has been acquired unlawfully, is being unlawfully used or disclosed, or there is imminent risk of unlawful acquisition, use or disclosure of the trade secret.

(3) When considering whether prohibition or injunction can be applied according to (1), the court shall take into account the particular circumstances of the case, including, if relevant,

- 1) the value of the trade secret or other specific features of the trade secret,
- 2) the precautionary measures taken to safeguard the trade secret,
- 3) the conduct of the claimant in acquiring, using or disclosing the trade secret,
- 4) the consequences of the unlawful use or disclosure of the trade secret,
- 5) the legitimate interests and possible consequences for the parties if the application on prohibition or injunction is granted or rejected,
- 6) the legitimate interests of third parties,
- 7) the public interest, and
- 8) the safeguard of fundamental rights.

(4) The court can wholly or partially revoke the prohibition or injunction applied according to (1), when the information on which the prohibition or injunction was based no longer comprises a trade secret, according to Section 2 (1), and this is due to reasons that can no longer be ascribed to the defendant. Furthermore, the court can wholly or partially revoke the prohibition or injunction applied according to (1) in pursuance of Section 426 (2), nos. 2 and 3, and (3) of the Administration of Justice Act.

(5) According to Chapter 40 of the Administration of Justice Act and as an alternative to prohibition or injunction, the court can decide that the alleged infringer can continue to use the trade secret by providing security for compensation to the alleged infringed party.

**9.** If the court applies a prohibition or injunction in pursuance of Section 8, it can, at the request of the trade secret holder, concurrently rule on the surrendering of the alleged infringing goods if there is good reason to believe that they will be used to violate the prohibition or injunction.

(2) During the process of a request for surrender, Sections 423 (1), second sentence, and (4) apply correspondingly.

**10.** Assistance for the enforcement of prohibition or injunction applied according to Section 8 shall be provided by the probate court according to the rules in Chapter 57 of the Administration of Justice Act.

(2) At the request of the trade secret holder, the probate court can rule on the surrendering of the alleged infringing goods to the trade secret holder if there is good reason to believe that they will be used to violate the prohibition or injunction.

**11.** In cases involving unlawful acquisition, use or disclosure of a trade secret, Section 428 of the Administration of Justice Act applies correspondingly with regard to third parties who have suffered as a result of a prohibition or injunction.

## Chapter 5

### *Ruling on prohibition and injunction*

**12.** When the court has ascertained that an unlawful acquisition, use or disclosure of a trade secret has occurred, cf. Section 4, the court can implement the following precautionary measures with regard to a trade secret:

- 1) The cessation of or, as the case may be, the provisional prohibition of the use or disclosure of the trade secret.
- 2) Prohibition of the production, offer to sell, marketing or use of infringing goods, or the importation, export or storage of infringing goods for those purposes.
- 3) Recall of the infringing goods from the market.
- 4) Elimination of infringing aspects of the infringing goods.
- 5) The destruction of the infringing goods or, as the case may be, the recall of the goods from the market, providing that such recall will not prevent protection of the respective trade secret.
- 6) Destruction of all or parts of documents, objects, materials, substances or electronic files containing or comprising the trade secret, or as the case may be, surrendering to the plaintiff all or parts of such documents, objects, materials, substances or electronic files.

(2) When the court considers whether the precautionary measures according to (1) can be applied and evaluates the proportionality of such measures, the court shall take into account the specific circumstances of the case, including:

- 1) the value of the trade secret or other specific features,
- 2) the precautionary measures taken to safeguard the trade secret,
- 3) the conduct of the infringer in acquiring, using or disclosing the trade secret,
- 4) the consequences of the unlawful use or disclosure of the trade secret,
- 5) the legitimate interests and possible consequences for the parties if the precautionary measures are complied with or rejected,
- 6) the legitimate interests of third parties,
- 7) the public interest, and
- 8) the safeguard of fundamental rights.

(3) When the court limits the duration of precautionary measures according to (1), nos 1 and 2, the duration must be sufficient to eliminate any commercial or financial benefit the infringer could have achieved as a result of unlawful acquisition, use or disclosure of the trade secret. The precautionary measures shall lapse when they are no longer covered by Section 2 (1), and due to circumstances that cannot be directly or indirectly attributed to the defendant.

(4) The precautionary measures according to (1), nos 3-6, shall be implemented at the expense of the infringer, unless there are special reasons for not doing so. The precautionary measures will not affect any possible compensation to the trade secret holder for the unlawful acquisition, use or disclosure of the trade secret.

**13.** Instead of applying precautionary measures according to Section 12, the court can, at the request of the person to whom they can be applied, rule that said person shall pay compensation to the infringed party, if

- 1) the person concerned at the time of use or disclosure neither knew nor ought to have known under the circumstances that the trade secret had been acquired from another person who was using or disclosing the trade secret unlawfully,
- 2) implementation of the precautionary measures in question will harm the person in question disproportionately, and
- 3) a monetary payment to the infringed party appears to be reasonable.

(2) Compensation according to (1), that replaces the precautionary measures according to Section 12 (1), nos 1 and 2, cannot exceed the fees or duties payable by the person ordered to pay compensation during the period when use of the trade secret could have been prohibited, if the person in question had requested permission to use the trade secret in question.

## Chapter 6

### *Legal proceedings*

**14.** An application for a prohibition or injunction in pursuance of Section 8 shall be submitted to the court within 6 months of the trade secret holder having become aware of an unlawful acquisition, use or disclosure of the trade secret to an extent that gives the trade secret holder sufficient grounds to submit such a request.

(2) Legal proceedings requesting precautionary measures in pursuance of Section 12 (1) shall be submitted to the court within 6 months of the trade secret holder having become aware of the unlawful acquisition, use or disclosure of the trade secret to an extent that gives the trade secret holder sufficient grounds to submit such proceedings.

## Chapter 7

### *Compensation*

**15.** Anyone who deliberately or negligently performs an unlawful action, as referred to in Section 4, shall compensate for the damages the trade secret holder has suffered as a result.

(2) The value of compensation shall be determined, among other things, on the basis of the trade secret holder's loss of profit and the infringer's unauthorised gain.

(3) Notwithstanding (2), the compensation can be set at an amount which at least corresponds to a reasonable payment for use of the trade secret.

(4) In addition to compensation, a payment can be determined to the trade secret holder for non-financial damages.

## Chapter 8

### *Recurring penalty payments*

**16.** In the event of failure to comply with a prohibition or injunction applied in pursuance of Section 8 and in the event of a court ruling defining precautionary measures in pursuance of Section 12, the probate court can, upon request of the trade secret holder, impose recurring penalty payments on the person against whom the prohibition, injunction or precautionary measures are directed.

(2) Recurring penalty payments shall be set as daily or weekly fines that run until the prohibition, injunction or precautionary measures are complied with. However if it deems it appropriate, the probate court can decide that a single fine can be set that is due for payment when there is lack of compliance with a decision that the prohibition, injunction or precautionary measure must be complied with at a specific point in time.

## Chapter 9

### *Publication of court rulings*

**17.** When sentencing someone for unlawful acquisition, use or disclosure of a trade secret, the court can rule that the sentence must be published in whole or part at the request of the infringed party.

(2) The duty to publish rests with the infringer. Publication shall be accomplished at the expense of the infringer and in such a prominent manner as can be reasonably demanded. In the event of publication according to (1), the trade secret shall be protected.

(3) When the court rules on publication according to (1) and evaluates the proportionality of the same, the court shall, to the relevant extent, take into account:

- 1) the value of the trade secret,
- 2) the conduct of the infringer in acquiring, using or disclosing the trade secret,
- 3) the consequences of the unlawful use or disclosure of the trade secret,
- 4) the likelihood of the infringer continuing to unlawfully acquire, use or disclose the trade secret, and
- 5) whether the details on the infringer will be of such a nature that a natural person can be identified, and if that is the case, whether publication of such details is justified, particularly on the basis of the possible harm publication can cause to the private life and reputation of the infringer.

### Chapter 10

#### *Sanctions*

**18.** Violation of Section 4 shall be punishable by fine or imprisonment of up to 1 year and 6 months, unless a higher penalty is applicable according to Section 299 a of the Penal Code, providing the person concerned

- 1) is in the service of or in partnership with the infringed party or acts on the behalf of the infringed party,
- 2) has lawful access to the business activities of the infringed party, or
- 3) in the course of other business-related circumstances has been entrusted with technical drawings, specifications, formulae, models or the like.

(2) A reprimand can only be given at the request of the plaintiff.

(3) Companies etc. (legal entities) can be held criminally liable according to the rules in Chapter 5 of the Penal Code.

### Chapter 11

#### *Entry into force*

**19.** The Act enters into force on 9 June 2018.

(2) The deadlines in Section 14 expire no earlier than 6 months after the Act enters into force.

### Chapter 12

#### *Amendment of other legislation*

**20.** The following amendments shall be made to Act no. 426 of 3 May 2017, the Marketing Practices Act:

**1.** *The heading* before Section 23 is repealed.

**2.** *Section 23* is repealed.

**3.** *Section 37 (5)* is repealed.

(6) and (7) hereinafter become (5) and (6).

**21.** The following amendments shall be made to the Penal Act, cf. Consolidated Act no. 977 of 9 August 2017, as amended by Section 1 of Act no. 1402 of 5 December 2017, Section 1 of Act no. 1680 of 26 December 2017, Section 1 of Act no. 140 of 28 February 2018 and Act no. 141 of 28 February 2018:

**1.** Section 299 a, *1st sentence*, "Section 23 of the Marketing Practices Act" to be amended to "Section 4, cf. Section 18 (1), nos 1-3, of the Trade Secrets Act".

Chapter 13  
*Territorial Provisions*

**22.** The Act does not apply to the Faroe Islands and Greenland.

*Given at Christiansborg Castle on 25 April 2018*

Under Our Royal Hand and Seal

MARGRETHE R.

/ Brian Mikkelsen

<sup>1)</sup>The Act implements Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, Official Journal of the EU 2016, no. L 157/1, page 1.