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## AMENDMENT OF THE AUSTRIAN ACT AGAINST UNFAIR COMPETITION (UWG) – THE DIRECTIVE ON THE PROTECTION OF KNOW-HOW ENTERS INTO FORCE IN EARLY 2019

Directive (EU) 2016/943 "on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure", adopted on 8 June 2016, will be implemented in Austria by an amendment to the Federal Act against Unfair Competition (UWG) and is to enter into force on 1 February 2019.

With the implementation of the EU Trade Secrets Directive, the protection of trade and business secrets, a legal area that has so far only been rudimentarily developed and mainly characterised by case law, will become an essential component of Austrian competition law. Companies and research institutions worldwide invest in the development of their products, employees and market strategies to gain an economic advantage over their competitors. This "know-how" holds high economic value for its owner on the one hand and arouses keen interest among competitors on the other, making it important for every entrepreneur to protect his "know-how".

In Austria, the provisions of the Trade Secrets Directive are to be implemented in Sections 26a - 26j of the Act against Unfair Competition (UWG) and are intended to provide stronger protection for trade secrets and counteract the danger of industrial espionage and betrayal of secrets.

### THE TRADE SECRET

With the implementation of the Directive, a uniform term for "trade secret" is laid down in law for the first time.

**Trade Secret** means information, which is

- **secret**, in the sense that it is not generally known or readily accessible;
- **has commercial value because it is secret** and
- has been **subject to reasonable steps** under the circumstances, by the person lawfully in control of the information, **to keep it secret**.

Both a natural and a legal person can be the holder of a trade secret.

### TRADE SECRET PROTECTION MEASURES

Only information which is subject to reasonable confidentiality measures shall be covered by the protection of trade secrets. A distinction can be made between

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contractual (confidentiality agreements and competition clauses), organisational (documentation of trade secrets, distribution of information among several keepers of trade secrets, etc.) and technical (access restrictions and encryption) confidentiality measures.

Which measures are best suited for effective "know-how" protection and "reasonable under the circumstances" cannot be generally answered and depends on the nature and individual use of the trade secret. However, to ensure comprehensive protection, it is advisable to apply a combination of different confidentiality measures.

## UNLAWFUL & LAWFUL ACQUISITION

The acquisition of a trade secret without the consent of the trade secret holder is unlawful if, *inter alia*, it is carried out by unauthorised access to, appropriation or copying of any documents or electronic files containing the trade secret or from which it can be deduced. The use or disclosure of a trade secret is considered to be unlawful where, for example, a person had acquired the trade secret unlawfully or is, for instance, in breach of a confidentiality agreement.

The acquisition of a trade secret shall be deemed lawful when it is obtained, for instance, by independent discovery or creation and appropriation through dismantling or testing of products (reverse engineering). The use and disclosure of trade secrets shall be considered lawful in case of whistleblowing or with respect to the functions of employee representatives.

## LEGAL REMEDIES

The law provides for provisional and precautionary measures in the event of unlawful use, exploitation and disclosure of trade secrets by way of interim injunction; furthermore, the new law does provide for the possibility of seizure or delivery up of suspected infringing goods. In the event of intentional or negligent behavior, the infringer shall pay damages to the trade secret holder.

Claims arising from the infringement of trade secrets are subject to a limitation period of 3 years from the date of knowledge of the infringement and the alleged infringer. In any case, such claims shall become statute-barred 6 years after the act of infringement occurred.

## PROTECTION IN THE COURSE OF LEGAL PROCEEDINGS

New procedural provisions to protect the confidentiality of trade secrets in the course of legal proceedings will be implemented: In order not to disclose trade secrets during legal proceedings, a duly substantiated application to the court which proves the existence of a trade secret and its infringement is sufficient. Upon application by a party or at the court's own initiative, the court must take measures to prevent the disclosure of trade secrets which may include restricting public access to hearings and initially preventing the disclosure to the (alleged) infringer; a court appointed expert is then to examine and

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determine the existence of a trade secret and its possible infringement ("*in camera proceedings*").

## WHEN DOES THE AMENDMENT OF THE AUSTRIAN ACT AGAINST UNFAIR COMPETITION (UWG) ENTER INTO FORCE?

Government bill 375 amending the Act against Unfair Competition (UWG) and implementing the Trade Secrets Directive is currently being examined by the National Council. It is likely to be adopted in 2018 and is expected to enter into force on 1 February 2019.

### About WOLF THEISS

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