



# Trade Secret Protection

A Global Guide

Consulting Editor **Trevor Cook**

# Turkey

Uğur Aktekin  
Güldeniz Doğan Alkan  
Gün + Partners

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## 1. Substantive aspects of both criminal and civil law

### 1.1 Legal theories and principal sources of law

In Turkey there is no specific law or other legislation in effect with regard to trade secrets and their protection – the interest of the owner provides an imperfect exclusive right over trade secrets. They are not protected under specific laws, but protected under the general provisions of Turkish civil law.

The most general provision that constitutes a basis for the protection of trade secrets is Article 17 of the Turkish Constitution, which states: “Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence.” Trade secrets are considered as protected under this corporeal and spiritual existence.

Another general law under which trade secrets are protected is the Turkish Civil Code (Law 4721). Article 24 of the Civil Code sets forth the general principle that a person whose personal rights are violated may claim protection from a judge against the infringer. Article 25 of the same code stipulates the types of actions that might be brought against the infringer, such as declaration, prevention or prohibition.

The fundamental and most detailed protection for trade secrets is provided by the provisions on unfair competition under the Commercial Code (Law 6102). Recent revisions to this code have brought clarity of wording for the protection of trade secrets, and the wording now explicitly states that disclosing trade secrets causes unfair competition. In the Commercial Code, the concept of unfair competition is regulated under Article 54 and following. Some frequently encountered forms of unfair competition are mentioned under this regulation. In this respect, it is ruled that benefiting from another’s work products without authorisation constitutes unfair competition. A more explicit example of unfair competition regarding the trade secrets mentioned in this provision is the disclosure of production and trade secrets in an unjustified manner.

The Turkish Code of Obligations (Law 6098) and the Labour Law (Law 4857) contain other relevant provisions on the conditions for and consequences of trade secret violations.

Moreover, when there are specific contractual relations between the parties, such as labour agreements, franchise agreements, know-how agreements or non-competition agreements, the particular provisions of such contracts will apply to the

protection of trade secrets, to the extent that the provisions of the contracts are in line with the general written rules of Turkish law.

The conditions and consequences of the criminal dimension for trade secrets are regulated under the Turkish Criminal Code (Law 5237) as well as under specific criminal provisions in the relevant civil codes and statutes.

## 1.2 Qualification for protection

Secrets are works, transactions or information which are intended to be kept confidential because their privacy provides commercial advantage to their owner. Secrets should possess some qualities such as the existence of confidential information, the will to keep it secret, the interest of the owner in keeping it secret, and veracity.

The requirement for the existence of confidential information implies that the information that is the subject of the secret must not be generally known. This means that a secret cannot be public knowledge. In practice, it seems impossible today that a secret is known by only one person, but it will be sufficient that just a few people know this information. Secondly, the owner of the secret must be aware of the value of this information and willing to keep it confidential. Also, the owner of the secret should have an interest in keeping the information confidential. If the publication of the secret puts the financial interest of the company at risk, it is generally accepted that this secret provides interest for its owner. Finally, the secret must be based on real facts, persons or information.

Other requirements that must be satisfied are as follows:

- A trade secret must be confidential. The scope of secrecy is determined case by case, taking a number of criteria into consideration. In this context, the degree of knowledge of other colleagues about that business information, the measures taken by the owner of the secret to preserve secrecy, and the ease or difficulty of obtaining the business information by unlawful means would be of great importance.
- A trade secret is expected to be unknown to other colleagues or enterprises in the same sector.
- The owner of the trade secret is expected to make reasonable efforts to preserve its secrecy. The efforts of the owner must be active and concrete.
- Obtaining a trade secret is expected to be very difficult and the trade secret should not be accessible through lawful means. This requirement is interdependent with that in the previous bullet point in that the severity of the measures taken by the owner to preserve secrecy would also increase the difficulty of acquiring the information lawfully.
- The business information must possess an economic value in itself, independent of the value of the enterprise or company. The unique value of the trade secret might be determined through the availability and willingness of third parties to pay a certain amount to the owner in exchange for learning and using the secret.

Nonetheless, there are some situations where a particular piece of information no longer qualifies as a trade secret, such as: disclosure to third parties without

indicating that the information must be kept confidential; the publication of the information; and its reverse engineering. If the trade secret is shared with a third party without specifying that this information is a trade secret and that it should be kept confidential, its qualification as a trade secret is lost. If the details of the trade secret are published through any means, this will constitute disclosure to the public and will eliminate the qualification of being a trade secret. Reverse engineering – where third parties buy the product, analyse it and determine the techniques through which it is produced – is another situation in which the qualification of being a trade secret disappears; however, reverse engineering does not constitute infringement of the trade secret because it does not exactly demonstrate that the trade secret was learned through unlawful means.

There is no specific definition of ‘trade secret’ in Turkish law. However, we may conclude that a trade secret is any information or document that is generally unknown, that is difficult to acquire and that provides economic benefit to its owner, since all trade secrets must satisfy these requirements. The following are listed as trade secrets in Turkey’s Draft Law on Trade Secrets, Banking Secrets and Client Secrets (see also section 4.1 below): organisational structure, financial and cash position, creditworthiness, research and development activities, activity strategies, raw material resources, employee information, technical details of a means of production, pricing policies, marketing tactics and costs, market shares, connected retailers and wholesalers, customer lists and information, contractual links, databases and working methods. However, the types of trade secret listed here are examples provided for illustration and do not comprise a definitive list.

Information and documents possessing the qualities specified above will be protected as trade secrets.

### 1.3 **Assignment and transfer of trade secrets**

The status of trade secrets and a legal interest in them are not clearly defined in Turkish legislation. It is widely accepted that trade secrets are intangible assets and the rights over them may be defined as imperfect exclusive rights. These exclusive rights are imperfect because they are not regulated with special legislation as other intangible assets and they are evaluated according to the general protective provisions of the law.

The assignment of trade secrets is not expressly regulated. Furthermore, uncertainty concerning which types of rights can exist over trade secrets complicates the terms of their assignment. It is beyond doubt that trade secrets generate monetary value for their owners. However, unlike other intangible assets of a company, the nature of trade secrets is not very convenient for assignment since trade secrets must be kept secret and must be known by only a few persons.

Nevertheless, if we evaluate trade secrets as ‘know-how’ by analogy, transfer in exchange of remuneration would seem possible. However, a trade secret is a kind of information that will still be known by the assignor, even if it is transmitted to another party. Therefore, rights over trade secrets as well as the terms and restrictions of their usage ought to be regulated by express provisions.

#### 1.4 **Right to assert misuse of trade secrets**

In accordance with the protection provided by the Turkish Constitution and the Turkish Civil Code, every person (both real and legal persons) whose personal rights are violated may claim protection for his rights against the infringer. When the misuse or improper dissemination of a trade secret also constitutes or is able to constitute a violation of personal rights, the party whose rights are violated may request the prevention of the danger of violation, the termination of the violation or the determination of the existence of it. Also, it is possible to request the publication of the court decision or its notification to third parties.

#### 1.5 **Threshold for the breach of a trade secret**

Trade secrets are generally protected by the provisions on unfair competition in the Commercial Code. Especially with the recent revisions to that code, there now exist clear clauses for the protection of trade secrets and these explicitly state that disclosing trade secrets causes unfair competition.

In the Commercial Code, the concept of unfair competition is regulated under Article 54 and following. Some frequently encountered forms of unfair competition are also set forth under this regulation. In this respect, it is ruled that benefiting from another's work products without authorisation constitutes unfair competition. According to these provision, benefiting without authorisation from a business product such as an offer, calculation or plan that was entrusted to the infringer and benefiting from business products belonging to a third party by knowing that those are provided to him without authorisation each constitute unfair competition. Another explicit example of unfair competition regarding trade secrets mentioned in these provisions is the disclosure of production and trade secrets in an unjustified manner, especially by making use of or transmitting the trade secrets obtained underhandedly and without permission or through another unlawful means. Finally, not obeying the rules that are set by law or by contract for employees or for competitors in relation to trade secrets constitutes unfair competition.

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

The judgments obtained pursuant to Articles 56(b) and 56(c) of the Commercial Code are also enforced against persons who, for a commercial objective, have directly or indirectly obtained goods that were subject to unfair competition (see section 1.4 above). However, third parties who have committed these acts in good faith cannot be held responsible for compensation for damages, because the compensatory liability requires fault.

Turning to the criminal liability of legal persons, Article 62 of the Commercial Code, which lays down the imprisonment penalty or judicial fine in relation to a breach of trade secret, will apply to an organisation's shareholders as well to members of the relevant organisation who acted or were required to act on behalf of the legal person, where the act constituting unfair competition is committed during the performance of the work.

### 1.7 Defences available

It is controversial whether an ex-employee may use, after his employment has ended, the information constituting a trade secret that is known to him through his employment. Such usages are commonly prevented by non-compete agreements concluded between employers and employees. Most cases before the courts with respect to trade secret, arise from breach of those agreements. It might be possible to assert that the agreement or a specific term under it is not breached.

### 1.8 Liability of claimants

It is possible to file a compensation action, pursuant to the general provisions on tortious acts, in order to recover pecuniary and non-pecuniary losses caused by an allegation that turns out to be unfounded. However, the plaintiff must prove the damages suffered and submit strong evidence.

In addition, there are special provisions relating to preliminary injunctions. Article 399 of the Turkish Code of Civil Procedure states that the party whose request for a preliminary injunction turns out to be unfounded will be liable for the loss that the counterparty suffered as a result of the injunction. This action should be brought before the court that heard the principal action. The statute of limitation for this action is one year from the finalisation of the court decision or the removal of a preliminary injunction.

## 2. Final remedies under both criminal and civil law

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

As per Article 56 of the Commercial Code, every person whose clients, credit position, professional reputation, commercial activities or other economic interests are damaged as a result of unfair competition may apply to the court for:

- determination of the unfairness of the act;
- prevention of unfair competition;
- removal of the financial situation resulting from the unfair competition;
- correction of statements if unfair competition has arisen as a result of incorrect or misleading statements;
- destruction of the means of, and the goods giving rise to, unfair competition – provided that such destruction is necessary for the prevention of the infringement;
- compensation for damages if the violation is committed in bad faith; and
- compensation for immaterial damage, provided that the requirements of Article 58 of the Code of Obligations are met.

The judge in the case may also calculate the compensation based on the profit the infringer is expected to obtain as a result of the unfair competition.

Article 56 of the Commercial Code also stipulates that the clients whose financial interests are damaged or are threatened with damage may also file the above-mentioned actions (except the destruction of the means and goods used in the act(s) giving rise to unfair competition). In addition, the chambers of commerce and

industry, chambers of artisans, non-governmental organisations and public institutions may bring the actions (other than compensation for damage under the final two bullet points above).

The judgments obtained pursuant to the second and third bullet points above are also enforced against persons who for a commercial objective have directly or indirectly obtained the goods that were subject to unfair competition.

If the act deemed to constitute unfair competition is committed by employees while performing their work or service, actions for the purposes listed above may be filed also against their employers. However, if the employers prove with tangible evidence that they fulfilled their duty of care, they will be discharged from compensatory liability under the final two bullet points above.

The judge in a case may decide to notify third parties of the act of unfair competition or of its judgment, or to publish the same, if deemed necessary for the prevention of unfair competition.

## **2.2 Remedies for extraterritorial activities breaching a trade secret**

If there is a foreign element in the dispute, the applicable law will be determined according to the Turkish conflict-of-laws rules, which are set forth in the International Private and Civil Procedure Law numbered 5718.

If there is a contractual relationship between the breaching party and the owner of the trade secret, the obligations arising from the contract will be subject to the law that the parties have explicitly determined, pursuant to Article 24 of the International Private and Civil Procedure Law. If the governing law is not specified, the law that has the closest relationship to the dispute will be applied.

However, if there is no contractual relationship and the breach of the trade secret constitutes a tort, Article 34 of the International Private and Civil Procedure Law will apply. This article states that obligations arising from tortious acts will be subject to the law in which the tort is committed. If the country in which the tort is committed and the country where the damage occurs are different, then the law of the latter will be applied.

## **2.3 Obtaining an injunction**

The protection provided with the unfair competition provisions of the Commercial Code also extends to the likelihood of damage in addition to the damage that has actually occurred. The existence of such likelihood must, though, be proved with tangible evidence.

Although the so-called 'springboard' doctrine is not widely known or discussed in Turkish law, it is possible for a judge to grant a proactive injunction, based on the above-mentioned provisions of the Commercial Code, which provides for the possibility of preventing the likelihood of damage.

## **2.4 Monetary remedies**

Monetary remedies available consist mainly of compensation for pecuniary and non-pecuniary damage. If there is an act of unfair competition committed with fault, it is possible to request compensation pursuant to Article 56 of the Commercial Code.

The judge in the case may base compensation on the profit that the infringer is able to obtain as a result of the unfair competition. In addition, damages for pain and suffering may be requested if the conditions of Article 58 of the Commercial Code are met, namely an infringement of personal rights and the damage caused by the infringement.

These provisions are, however, always subject to the Code of Obligations, which is the principal regulation on compensation provisions. According to the provision regarding the determination of compensation, the judge determines the scope of the compensation and the means of payment by considering the damages proved by the plaintiff and the gravity of fault.

If the act of infringement of the trade secret does not constitute a specific form of unfair competition, it is still possible to compensate for the damage arising from the infringement of the trade secret pursuant to the general provisions of compensation in the Code of Obligations.

It is possible to impose a judicial fine within the ambit of criminal responsibility, pursuant to Article 62 of the Commercial Code. The choice between imposing imprisonment (see section 2.6 below) and imposing a judicial fine is at the discretion of the judge.

## 2.5 Restitutionary remedies

Restitutionary remedies are not available under Turkish law.

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

Article 62 of the Commercial Code states that any person who commits in bad faith the acts of unfair competition stipulated in Article 55 of the same law is liable for criminal responsibility. Those acts are:

- benefiting from others' work products that are entrusted to him, without authorisation;
- benefiting from business products belonging to a third party when knowing that those are provided to him without authority;
- the disclosure of production or trade secrets in an unjustified manner;
- making use of or transmitting the trade secrets obtained underhandedly and without permission or through another unlawful manner; and
- non-compliance with the employment rules that are set by law or contract for employees or for competitors in relation to trade secrets.

Persons who deceive employees, or agents of an employer, in order to acquire the employer's production or trade secrets have criminal liability.

The punishment for the listed acts depends upon the complaint of the persons who have the right to file an action pursuant to Article 56 of the Commercial Code, which regulates the civil liability of unfair competition acts. The penalty of committing the above-mentioned acts is imprisonment for up to two years or a judicial fine for each particular crime.

The criminal liability of legal persons is regulated in Article 57 of the Commercial Code, and implies that where an act of unfair competition is committed during the



performance of that person's work, Article 56 on the penalty of imprisonment or a judicial fine will apply to the shareholders and members of the relevant organisation who acted or were required to have acted on behalf of the legal person. A judge has the power to order so-called 'special security measures' as legal sanctions relating to legal persons, and such measures can take the form of annulment of official authorisations, confiscation, etc.

Article 239 of the Criminal Code states that persons holding information or documents containing commercial secrets, banking secrets or client secrets because of their job or job title, who are then found, upon complaint, to have disclosed the information or documents to unauthorised persons, are liable to be sentenced to imprisonment from one to three years and to have a judicial fine imposed that corresponds to up to 5,000 days at a rate of TRY20 to TRY100 per day (as determined by the judge in the case). The persons who obtain the information and documents through unlawful means and give or disclose them to unauthorised persons will be sentenced likewise. If these secrets are disclosed to a foreigner residing abroad or his officers, the penalty will be increased by one third of the principal penalty.

If a person is compelled by threat or duress to disclose the above-mentioned secrets, the person causing the compulsion is liable to be sentenced to between three and seven years of imprisonment.

### **3. Procedural aspects under both criminal and civil law**

#### **3.1 Enforcing trade secret rights in Turkey**

In a case of infringement of a trade secret, the owner of that trade secret would be entitled to file a civil action under the provisions of the Commercial Code, a criminal action under the provisions of the Criminal Code or – as another option, which is faster and more practicable – a preliminary injunction request. The remedies that might be requested in civil and criminal actions are explained above in section 2.

If the recovery of a loss of right will be impossible or seriously jeopardised if left until the end of the adjudication, the owner of the infringed right (ie, the owner of the trade secret in our case) may request the court to grant a preliminary injunction decision. With such a decision, the requesting party will be able to prevent further infringing acts of the infringer during the adjudication process.

The civil actions provided for under Article 56 of the Commercial Code can be filed within one year from learning of the events leading to the right to bring such action, and within three years from the events themselves. This time limitation does not start as long as the acts of unfair competition continue.

If unfair competition acts constitute a crime at the same time, as mentioned under section 2.6 above a longer time limit is provided under the Turkish Criminal Code and such longer time limitation will apply for both the civil and the criminal action. The time limitation is 8–15 years, depending on the nature of the crime, as per Article 66 of the Criminal Code.

Although there is no specific statutory time limitation for requesting a preliminary injunction, it should be requested as soon as possible after being aware of the infringement since one of the conditions for its grant is the danger of serious

damage or other inconvenience in a case of delay. It may be requested prior to a main action or together with the main action.

### 3.2 Customs measures

Customs officers may seize products that are subject to punishable infringement of the rights of the owner, for 10 days, upon the request of the owner, considering that the infringement of a trade secret will create unfair competition and such custom measures are foreseen for unfair competition. If the owner does not file the principal action or obtain a preliminary injunction from the court within that period, the seizure decision will be revoked

Seizure by the customs authorities is regulated by special legislation applying to customs administration, namely the Regulation on Customs, which was published in Turkey's *Official Gazette* dated September 7 2009 and numbered 27369.

### 3.3 Courts for actions involving the breach of trade secrets

Actions arising from acts of unfair competition are filed in the commercial courts of first instance. These courts may be regarded as specialised to a certain degree, since all actions filed as a result of unfair competition are heard before these courts. Besides, there are precedents established by the Assembly of Civil Chambers of the Court of Appeals implying that commercial courts are specialised courts that are able to examine disputes with respect to trade secrets.

Most trade secret disputes relate to unfair competition and to non-compete agreements concluded between employers and employees. Although the jurisdiction of the labour courts is not wholly settled, it is settled by the precedents of the Assembly of Civil Chambers of the Court of Appeals that disputes arising from non-compete agreements between employers and employees after the termination of labour agreements should be resolved by the commercial courts.

Criminal action based on Article 239 of the Criminal Code will be brought before the criminal courts of first instance if the public prosecutor who conducts the investigation process is convinced that an offence has been committed. He will then bring the offence before the criminal court.

The written rules of law are the primary sources for the judges of all courts in Turkey and will apply above all other considerations. If there is no clear written rule regulating an area, the judges of civil courts will consider secondary sources, namely doctrine and precedents. However, in criminal law only the written rules of law apply; doctrine or precedents are not accepted as sources of law, due to the nature and different principles of criminal law.

### 3.4 Procedure under civil proceedings

The types of actions explained earlier in this chapter might be brought before the courts. Alternative procedures such as pre-trial discovery or the production of documents by the parties to a dispute are not practised in Turkey.

However, as explained in detail below, it is possible to apply to the court in order to obtain a preliminary injunction before or during the main action. If the preliminary injunction request is made before the filing of the main action, it is

necessary to file the main action within two weeks from the preliminary injunction decision.

Another solution might be a determination of the evidence. In this context, it is possible to apply to the court in order to take actions such as expert examination, discovery or hearing witness testimonies serving for the determination of a fact that might be claimed in a future action. The applying party must prove with strong evidence that he has legal interest in the urgency of the determination of evidence – and if the subject of the request of evidence determination will disappear or will be difficult to determine later unless the evidence determination is conducted urgently, there is a presumption of legal interest. Such requests can be filed before the competent court that will hear the principal action, or before a court of peace where the evidence is present. The decision of evidence determination will be notified to the counterparty in principle; however, it is possible to conduct evidence determination without notification if this is necessary to protect the rights of the requesting party.

### **3.5 Preliminary relief available**

In accordance with the provisions of the Civil Procedure Code that regulates the terms of a preliminary injunction in general, the court may order any kind of measure that it deems right and proper for the elimination of risk of damage or the prevention of damage.

Under the Commercial Code, the court may order a preliminary injunction upon the request of the party who has the right to file an action. In this sense, the court may order the protection of the status quo, the removal of the position resulting from unfair competition, the prevention of unfair competition, the correction of incorrect or misleading statements, and other measures.

Moreover, upon the request of the owner, customs officers may seize the products that are subject to punishable infringement.

### **3.6 Right to appeal**

According to the Civil Procedure Code, which is the general regulation regarding the decisions that can be appealed, the final (as opposed to interim) decision of first-instance courts may be appealed. Rejection of a preliminary injunction request and acceptance/rejection of oppositions filed against the acceptance of a preliminary injunction request may only be appealed against together with the final decision.

Although Article 394 of the Civil Procedure Code provides that the rejection of preliminary injunction requests may be subject to appeal, which will be examined and settled with priority, the provisions of this code on the scope of the application of the provisions regarding appeals in this provisional period has caused contradictory precedents. As a result, the General Assembly on the Unification of Judgments discussed this subject and came to the conclusion that preliminary injunction decisions and interim decisions made as a result of oppositions against the preliminary injunction decisions are not subject to appeal before the Court of Appeals until the regional courts of justice begin their work as set forth in the current Civil Procedure Code.

If the preliminary injunction is not subject to opposition in the first place, it may be subject to appeal later, together with the final judgment given within the action.

Final judgments also may be appealed if the value of the dispute is above a monetary limit specified by statute, the 2015 limit being TRY2,080 (approximately €620). The time limit to file an appeal against a decision of the commercial court of first instance is 15 days from notification of the court decision to that party.

### 3.7 Legal costs

A plaintiff is charged with the costs related to possible litigation and must deposit an advance towards these costs. The advance contains the fixed application fee, the expert fees, the discovery fees, the notification expenses and a variable court fee proportional to the value of the action. The application fee for which the value of the action is €100,000 would be around €5,000 to €8,000.

The costs of the actual litigation, including the official attorney fees, will be charged to the losing party in principle. Other than the application fee, the judgment and writ fee will also be added to the final amount charged to the losing party, reckoned at €68.31 per thousand. The losing party is therefore likely to have to pay roughly €10,000 by the end of an action of which the value is €100,000.

The losing party must also pay the legal attorney fees of the counterparty. This amount is determined every year according to the published "Minimum Fee Tariff of the Bar for Attorneys at Law". According to this tariff, the attorney fees for a litigation which does not have a calculable pecuniary value is around €550 this year; if the action has a pecuniary value, the attorney fee is around 10% of this value.

## 4. General

### 4.1 Forthcoming legislation

It is clear that there is need for specific legislation to regulate trade secrets. Therefore, the Draft Law on Trade Secrets, Banking Secrets and Client Secrets is a welcome and much-anticipated development.

### 4.2 Trends and hot topics

No other trends or hot topics are current in Turkey other than the potential change of law mentioned in section 4.1 above.

### 4.3 Works of reference

Other than the pieces of legislation mentioned throughout the chapter, two other reference works are relevant:

Bilge, ME, *Protection of Trade Secrets* (in Turkish) (Ankara, 2005).

Usluel, AE, *Protection of Trade Secrets in Joint-Stock Companies* (in Turkish) (Istanbul, 2009).