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Criminal protection of trade secrets in Algerian and comparative Law

الحماية الجزائية للأسرار التجارية في القانون الجزائري والمقارن

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Abstract:

The subject of trade secrets has recently gained significant importance due to its major economic impact within the legal systems of various countries, particularly with the rise of infringements and violations against trade secrets and their owners. What has largely contributed to the spread of this phenomenon in modern times is the tremendous technological advancement affecting all sectors, amid increasingly fierce and sometimes unlawful commercial competition. Trade secrets have become a direct target of illicit activities, making it both necessary and urgent to confront such infringements, as they often lead to a loss of trust and credibility in commercial transactions involving such secrets.

key words: *Infringement – Trade secrets – Protection – Unfair competition.*

الملخص:

يحظى موضوع الأسرار التجارية بأهمية بالغة رغم حداثته لما يمثله هذا المجال من أهمية إقتصادية بالغة ضمن الأنظمة القانونية لمختلف دول العالم، خاصةمع بروز ظاهرة التجاوزات والتعديات على الأسرار التجاريةو مالكيها. ولعل ما ساعد في إنتشار هذه الظاهرة في الوقت المعاصر هوالتقدم التكنولوجي الهائل الذي مس جميع المجالات في ظل منافسة تجارية مهددة في مشروعيتها. ولقد أصبحت الأسرار التجارية هدف متصل بالأنشطة غير المشروعة، فكان التصدى لها أمر حتمياً وضروريا لما يؤدي التعدي عليها في الكثير من الأحيان إلى زعزعة الثقة والإئتمان بالتعاملات التجارية التي تكون محلها الأسرار التجارية.

الكلمات المفتاحية: التعدي – الأسرار التجارية – الحماية – المنافسة غير المشروعة.

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Introduction:

In recent years, there has been a noticeable increase in violations and infringements of trade secrets and the rights of their holders. This rise is closely linked to the rapid technological developments witnessed in the modern world, which have impacted all aspects of life. Unfortunately, these advancements have also led to the misuse of information technologies for unlawful purposes.

The evolution of electronic devices and modern scientific methods used in commerce has resulted in a widespread phenomenon of economic espionage at both the national and international levels. Trade secrets have thus become a prime target of illicit activities, making the need to protect them both urgent and imperative. Infringements upon trade secrets frequently undermine trust and reliability in commercial dealings, causing significant harm to the national economic growth of any given country.

This study aims to highlight the procedural criminal protection of trade secrets under Algerian and comparative law. Despite the critical importance of this subject, it has not received sufficient academic and legislative attention. Studies and research in this area remain scarce, offering limited support to researchers attempting to enrich their legal understanding or address the many legal questions it raises – especially under Algerian law.

Given that every emerging legal concept inevitably brings with it new legal challenges that require appropriate legal solutions, the central research problem of this paper is:

To what extent is criminal protection of trade secrets effective in the absence of a dedicated law? And are the existing national and international legal protections sufficient and effective?

The methodology adopted in this paper is both analytical and comparative, through which the concept of criminal protection of trade secrets will be examined and compared with foreign legislation.

The research problem will be addressed through two main axes:

Chapter One: Offenses related to trade secrets

Chapter Two: Criminal prosecution of offenses involving trade secret violations

Section I:
Offenses related to trade secrets

In the absence of specific criminal sanctions under current laws regulating the subject of trade secrets, their criminal protection remains subject to general legal provisions found in various legal texts. The penalty imposed for violations of trade secrets depends on the legal classification of the act.

A- The offense of unlawful disclosure of trade secrets:

This section will address the conceptual framework of trade secret disclosure, by examining the definition and meaning of trade secret disclosure.

1- Definition of trade secret disclosure:

To define the concept of trade secret disclosure, it is essential to address its linguistic, terminological, and legal meanings.

a. Linguistic meaning of trade secret disclosure:

The verb "to disclose" means to reveal or make known, as opposed to preserving or concealing. In Arabic, the word “fashā” (فشا)[1] carries the meaning of something spreading or becoming public. For instance, one may say “the disease spread among the people” or “the ink spread on thin paper”. The verb is also used in the context of livestock grazing across the land, indicating dissemination or diffusion[2].

Thus, from a linguistic standpoint, disclosure implies the loss of confidentiality, with the information moving from a protected state to a publicly accessible one.

b. Terminological meaning:

Legislations and legal systems use various terms to refer to trade secrets. Thisinclude:

– Know-how

– Confidential information

– Undisclosed information

However, the term "trade secret" is the most widely used and commonly recognized among business practitioners and in the context of commercial activities[3].

It refers to any non-public, economically valuable information, the secrecy of which gives its owner a competitive advantage.

Different legal systems may use slightly varying terminology, but all point toward the core idea of protecting commercially valuable, confidential information from unauthorized use or disclosure.

2- Definition of trade secret disclosure under Algerian law:

Trade secret disclosure refers to the act of revealing or divulging confidential information during the course of professional activity, whether verbally, in writing, or by gesture, in a way that causes harm to the reputation or dignity of the person to whom the secret belongs. Under Algerian law, such disclosure constitutes a criminal offense.The offense of unlawful disclosure of trade secrets consists of two essential elements: the material element (actus reus) and the moral element (mens rea)[4].

This element represents the physical act constituting the offense. It is manifested in the act of disclosing the trade secret without the consent of its owner. For the act to be considered criminal, the disclosed information must indeed qualify as a trade secret in both fact and law.

If the disclosure involves false information or merely consists of insulting or defamatory statements about a client or party, this would not fall under trade secret disclosure but would rather constitute defamation or insult[5]. In order to qualify as a trade secret deserving of legal protection, the information must meet the following legal criteria:It must be used in commerce or business activities, it must have economic value

due to its confidentiality, the owner must have taken reasonable steps to maintain its secrecy, ensuring that it remains competitive and unknown to others in the same market[6]. The extent of the disclosure (whether partial or complete, minimal or extensive) is irrelevant to its classification as a crime - any unauthorized disclosure may suffice.

Disclosure is inherently a material act and must be proven by evidence. If the disclosure resulted from the negligence or failure of the trade secret owner to take protective measures, it may not qualify as a criminal act. For instance, failing to adopt adequate safeguards to preserve the confidentiality of a secret may render the information unprotected in law. This refers to the mental state and intent of the offender. It must be established that the perpetrator knew the information was confidential and intentionally disclosed it, knowing that such an act was punishable by law.In other words, the criminal intent must be present - for example, when the secret was entrusted to the perpetrator by virtue of a professional, contractual, or employment relationship, and the person knowingly disclosed or used the information as if they were the rightful owner[7].

It is important to note that Algerian legislation has not yet established a specific legal framework dedicated exclusively to the protection of trade secrets. However, by returning to general legal principles, we observe that the Algerian Penal Code does refer to trade secret violations in a general manner, without specifying detailed provisions dedicated solely to this matter[8].

B- The offense of industrial espionage:

Industrial espionage is a modern criminal offense recognized in some legal systems as a result of the technological boom characterizing advanced economies. But what exactly does this offense entail?

In general terms, industrial or economic espionage refers to any method, system, or practice employed by an individual, group (including companies or even states) to obtain confidential and economically valuable information without the consent of the owner, and typically through illegal or unethical means[9]. This offense falls within the scope of economic crimes or corporate offenses, commonly referred to in English as “economic intelligence”.

According to Section 1831 of the U.S. Economic Espionage Act of 1996-05, industrial and economic espionage includes three primary activities, which may be carried out separately or together, depending on the intended objective[10]. The U.S. legislator has given this crime particular importance, establishing strict penalties under Section 1831 of the same Act. Additionally, Section 7 of the Actdefinesthis crime as: “Theft of corporate trade secrets, such as software source codes or scientific data”[11].

Furthermore, the United States Supreme Court has defined industrial espionage as follows "This crime is constituted when trade secrets are stolen for the benefit of a foreign government, with the intent to receive an advantage from the stolen information, not merely to transfer it."[12].

C- The crime of trade secret theft:

Article 350 of the Algerian Penal Code defines theft as follows "Anyone who takes something that does not belong to them shall be considered a thief". This raises a pertinent question To what extent can this general definition. Apply to the theft of trade secrets? Can trade secrets be considered "movable objects" capable of being the subject of theft?

Some legal scholars argue that trade secrets cannot be the subject of theft, since they are intangible and cannot be physically transported, unless they are embodied in a physical medium, such as documents, discs, or digital devices. In such cases, the theft would concern the medium, not the trade secret itself.

However, this opinion has been criticized, notably in light of legal precedent involving intangible items such as electricity, which have been recognized as subject to theft. For example, French jurisprudence has accepted that an item may be the object of theft as long as it has economic and financial value.Based on the commercial value of trade secrets, modern jurisprudence supports the idea that they can indeed be the subject of theft. An important case reflecting this trend is the ruling of the Criminal Court of Montbéliard (France), dated May 26, 1978[13], which convicted a former employee of the Peugeot company for stealing software copies containing proprietary confidential information. The court recognized this act as theft, confirming that the legal elements of the offense were present. In this context, the material element of the offense includes[14]:

– The unauthorized use of the information that was copied;

– The clandestine nature of the act, demonstrated by the perpetrator's intent to take possession of the information without the owner's consent.

Regarding the moral element, it is established in line with the general rules on intentional misdemeanors, which require specific intent. This means the offender must have acted with knowledge that the act constitutes a criminal offense and must have intended to commit it.

In comparison, Egyptian Law N°. 82 of 2002 on Intellectual Property Protection addresses this issue under Article 61, which imposes criminal liability for the disclosure of protected information, punishable by a fine of no less than 10,000 EGP and no more than 100,000 EGP. In case of recidivism, the punishment may include up to two years of imprisonment and a fine ranging from 50,000 EGP to 100,000 EGP.

Section II:
Criminal prosecution of trade secret offenses

Classifying violations against trade secrets as criminal misdemeanors under the law implies the initiation of criminal proceedings, which, upon proof, can lead to deterrent penalties as provided under general or special legislation, depending on each jurisdiction.This chapter seeks to answer the following question: What are the procedures for prosecuting such offenses, and how are they adjudicated?

A- Criminal proceedings for trade secret offenses:

The prosecution of trade secret violations is governed by the general rules of criminal procedure, namely the Algerian Code of Criminal Procedure. The process involves[15]:

Filing a criminal complaint by the victim (individual or legal entity);

The opening of a judicial investigation when the case is complex or involves multiple actors;

Intervention by the public prosecutor, who assesses whether the facts justify prosecution;

Referral of the case to the competent court, typically the criminal court for misdemeanors (tribunal correctional), depending on the offense's classification.The effectiveness of these procedures depends heavily on the availability of evidence, the clear identification of the trade secret, and proof of its confidential nature and economic value.

B- Prosecution of trade secret violations:

In this regard, criminal proceedings are initiated by a complaint filed by the injured party, i.e. the owner of the trade secret. This complaint is submitted to the Public Prosecutor, who initiates a preliminary investigation by issuing instructions to the judicial police (officers of the criminal investigation department). Once the preliminary investigation is completed, the case is referred back to the Public Prosecutor for a decision.If the Public Prosecutor finds that the legal elements of the offense are fulfilled, particularly those constituting a trade secret violation, the accused is referred to the competent criminal court.It is worth noting that Algeria has recently introduced a specialized commercial jurisdiction, notably competent in matters related to intellectual property disputes.

Indeed, the Algerian legislator addressed subject-matter jurisdiction in Chapter 1, Section 2 of the Code of Civil and Administrative Procedure, particularly Articles 32 and 36, and especially Article 536 bis, which explicitly grants exclusive jurisdiction to the specialized commercial court in all disputes relating to industrial and commercial property rights[16]. As such, the injured party may also lodge a criminal complaint accompanied by a civil claim (partiecivile) before the investigating judge, who, upon payment of a security deposit, will initiate an in-depth investigation. This investigation may require letters rogatory, especially if the offense involves foreign parties residing abroad[17].

C- Adjudication of criminal offenses related to trade secrets:

Before ruling on the case, the criminal judge must first verify whether the information at stake qualifies as a legally protected trade secret. This requires assessing whether the conditions of novelty, secrecy, and the implementation of protective measures by the owner are met, in addition to confirming its economic value.

Only after these elements are established does the judge proceed to examine the evidence submitted by the Prosecutor or the civil plaintiff and assess any defenses raised by the accused.If guilt is established, the judge may impose:

– A custodial sentence (prison),

– A monetary fine, and

– Civil damages in favor of the injured party as compensation for both material and moral harm suffered due to the theft of the trade secret.

In such a case, the offender is also prohibited from any further use of the trade secret[18].

1- Custodial sentences:

Comparative legal systems diverge on the precise duration of imprisonment: Egyptian law (Article 61 of Law No. 82 of 2002 on Intellectual Property) provides for a maximum of two (2) years of imprisonment. French law imposes a two-year prison term as a principal sentence. United States law, particularly under the Economic Espionage Act of 1996, provides for up to ten (10) years of imprisonment for theft of trade secrets.

In Algeria, Article 350 of the Penal Code stipulates that: "Anyone who takes something not belonging to them shall be punished by imprisonment and a fine ranging from 100,000 to 500,000 Algerian Dinars (DZD).19"

As stipulated in Article20 27 of Algerian Law N°. 02-04, which sets the rules applicable to commercial practices-02.As for financial penalties, they range in Egyptian law from 10,000 to 50,000 Egyptian pounds as a maximum. In French legislation, the fine is set at 300,000 euros.

2- Civil damages:

Generally, under both Algerian law and comparative legal systems, civil compensation falls under the discretionary power of the judge, who must take into account: The economic value of the trade secret,The loss of potential earnings by the injured party, The actual damages suffered. However, it has been observed that the amounts awarded by courts tend to be relatively low, especially when compared to the economic gain realized by the offender[21].

This raises an important legal issue: If the general rule requires that damages correspond to the harm suffered, should the profits generated by the infringer also be taken into account in calculating damages? Or should compensation be limited to the actual loss of the victim, regardless of the offender's unlawful profits?

In matters of liability, compensation is assessed based on the damage suffered, without considering the benefit obtained by the offender. The injured party is harmed by the loss they incurred, not by the gain realized by the infringer[22].

Conclusion:

It can be said that the legal systems in force in most countries around the world, including Algeria and other Arab states, were established decades ago, and at the time of

their enactment, they were indeed consistent with the prevailing circumstances and proportionate to the nature and extent of criminal activities.

However, with the evolution of crime, especially the emergence of modern economic and technological offenses, many of these legislative frameworks have become inadequate, particularly in addressing the protection of trade secrets.

In Algeria specifically, there is an urgent need for the adoption of a dedicated and deterrent legal framework to combat the theft and misappropriation of trade secrets.

This study has led to several key findings and recommendations, summarized as follows:

Findings and recommendations:

1- The Algerian legislator has not yet specifically regulated trade secrets, nor has it provided them with dedicated legal protection. Therefore, their protection currently relies on general legal principles, unlike the situation in Egypt, Jordan, or the United States.

2- Trade secrets remain protected only as long as their owners take effective steps to preserve their confidentiality.

3- There is a pressing need for specific legislation exclusively dedicated to the protection of trade secrets.

4- It is crucial to develop both preventive and punitive legal mechanisms to safeguard trade secret holders, ensure their rights are enforced, and prevent unauthorized disclosure by those entrusted with such information.

5- The appointment of a specialized expert in industrial property is essential in disputes involving trade secrets, especially during litigation or investigations.

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