

The Protection of Trade, Banking, and Customer Secrets in Turkish Criminal Law

Türk Ceza Hukukunda Ticari Sır, Bankacılık Sırrı ve Müşteri Sırrının Korunması

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ABSTRACT

Trade secrets, banking secrets, and customer secrets are subject to the same protection that has been provided by unfair competition laws or by other specific provisions such as the provisions of labor law, criminal law, and civil law. The privacy of trade, banking, and customer secrets is protected under the framework of criminal law in the Turkish Penal Code section for crimes of economy, industry, and trade. The goal of this study is to investigate the outlook of legislation as it relates to trade, banking, and customer secrets in Turkish criminal law. In this study, the crime of information disclosure and the criminal sharing of documents deemed as trade secrets, banking secrets, or customer secrets are analyzed in accordance with the general theory of crime. First, we examine both the material and moral elements of the current type of crime and discuss what reasons could justify that crime. Second, the study focuses on the special appearance forms of this criminal offense. In this regard, concurrence of crimes is explained as the main problem with regard to the violation of trade secrets, banking secrets, and customer secrets. This paper will also discuss available punishments for the perpetrator. In the last part of this study, we explain the draft law on "Trade Secrets, Banking Secrets, and Customer Secrets," which was created to clear up the inherent complexities of this issue, and attempt to balance it with the criminal framework that already exists for such secrets.

Keywords: Secrets, trade secrets, banking secrets, customer secrets, disclosure, unfair competition, Turkish Penal Code

ÖZ

Ticari sır, bankacılık sırrı ve müşteri sırları, haksız rekabete ilişkin hükümlerin yanı sıra, iş hukuku, ceza hukuku ve medeni hukukta yer alan özel hükümler tarafından sağlanan korumaya tabidir. Türk Ceza Kanunu'nda ticari sır, bankacılık sırrı veya müşteri sırlarının gizliliği, ekonomi, sanayi ve ticarete ilişkin suçların düzenlendiği bölümde koruma altına alınmıştır. Bu çalışmanın amacı, ticari sır, bankacılık sırrı ve müşteri sırlarına ilişkin Türk ceza hukukundaki düzenlemelerle ilgili genel bir bakış açısı sunmaktır. Çalışmada, ticari sır, bankacılık sırrı veya müşteri sırrı niteliğindeki bilgi veya belgelerin açıklanması suçu, suç genel teorisine göre analiz edilmiştir. Bu kapsamda öncelikle, suçun maddi ve manevi unsurları ele alınmış, daha sonra bu suç bakımından uygulama alanı bulabilecek hukuka uygunluk nedenlerine yer verilmiştir. İkinci olarak, suçun özel görünüş biçimleri irdelenmiştir. Bu bağlamda, ticari sır, bankacılık sırrı ve müşteri sırlarının gizliliğini korumayı amaçlayan farklı düzenlemeler arasındaki içtima sorunu ele alınmış ve son olarak bu suç için öngörülen yaptırımlara yer verilmiştir. Çalışmanın son bölümünde, "Ticari Sır, Banka Sırrı ve Müşteri Sırrı Hakkında Kanun Tasarısı" ile ilgili genel açıklamalar yapılmıştır.

Anahtar Kelimeler: Sır, ticari sır, bankacılık sırrı, müşteri sırrı, sırrın ifşası, haksız rekabet, Türk Ceza Kanunu

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EXTENDED ABSTRACT

Ensuring the confidentiality of trade secrets, banking secrets, and customer secrets is very important for commercial enterprises, companies, banks, and their customers. The protection of such secrets is related to the transparency of commercial enterprises, companies, banks, insurance companies, and brokerage firms operating in capital and financial markets. This protection is also related to the prevention of money laundering and subterranean economies as well as fighting against organized crime.

Secret or confidential information refers to information that is protected against disclosure and remains confidential. A trade secret is confidential information that creates an economic advantage for commercial enterprises and companies, gives them an advantage over their competitors (for example, advertising strategies, consumer profiles, distribution methods, sales methods, lists of suppliers and clients, and manufacturing processes), and has independent commercial value. The concept of trade secret has come to cover both the commercial and financial sectors. The unauthorized use of trade secrets by anyone other than the owner is regarded as unfair practice and a violation of the trade secret. In addition, it is important to clarify the extent of the trade secret both for defining the limits of the stakeholders' rights to receive information and for establishing the borders of disclosure in capital markets.

Banking secrets can be defined as all information related to bank financial, economic, or credit status. Finally, customer secrets refer to all types of information and documentation related to customer relations of commercial enterprises, companies, banks, etc., with regard to their own areas of activity and all information and documentation obtained by such enterprises related to the personal, economic, financial, cash, or credit status of their customers.

Depending on the national legal system, trade secrets, banking secrets, and customer secrets are subject to the protections provided for by unfair competition laws or other specific provisions like the provisions of labor law, criminal law, civil law, etc. Turkish law also provides numerous provisions regarding the protection of trade secrets. In this study, we first examine the provisions related to unfair competition in the Turkish Commercial Code, which provides legal protection for trade secrets, provisions for banking secrets and customers' personal data in the Banking Code, and related provisions of the Labor Code. However, the focus of this study is Turkish Penal Code regulations. This study's goal is to investigate the outlook of legislation

as it relates to trade, banking, and customer secrets in Turkish criminal law.

Corporation privacy and business secrets are protected under the economy, industry, and trade section of the Turkish Penal Code. In this study, the crime of information disclosure or documents deemed as trade secrets, banking secrets, or customer secrets is analyzed in accordance with the general theory of crime and the general provisions of the Turkish Penal Code. First, we examine both the material and moral elements of the current type of crime and discuss what reasons could justify that crime. In this respect, the most accepted definitions of trade secrets are introduced as the subject of the crime. Second, the study focuses on the special appearance forms of this criminal offense. In this regard, concurrence of crimes is explained as the main problem with regard to the violation of trade secrets, banking secrets, and customer secrets. This paper will also discuss available punishments for the perpetrator.

In the last part of this study, we explain the draft law on “Trade Secrets, Banking Secrets and Customer Secrets,” which was created to clear up the inherent complexities of this issue and attempt to balance it with the criminal framework that already exists for such secrets.

1. Introduction

Turkish law provides numerous provisions for the protection of trade secrets which can be found in various codes, such as the Turkish Penal Code, Banking Code, and Turkish Commercial Code.

The term *secret* refers to trade, banking, and customer secrets, and their protection by law is derived indirectly from the Constitution. According to Art. 20 of the Turkish Constitution, everyone is entitled to request the protection of his or her personal data. This right includes being informed of, having access to, and requesting the correction and deletion of personal data, as well as the right to be informed if these data are used consistently with envisaged objectives. Personal data can only be processed in cases envisaged by law or by the person’s explicit consent.¹

In practice, the most relevant statutory provision is the *unfair competition* provision of the Turkish Commercial Code (TCC). In this provision, some forms of unfair competition are defined, including “to prompt employees or representatives or other assisting persons to obtain or to disclose the production or trade secrets of their

1 YILDIZ/SÖZER, Data Protection in Turkey, p.1

customers” and “to disclose unlawfully production or trade secrets.” The remedies available in the event of unfair competition are also applied to trade secret violations. According to unfair competition rules, the party whose rights are violated can ask the court for violations to be determined, stopped, or prevented, and can request preliminary injunctions, request restoration of material facts resulting from the unfair competition and request payment of compensation for material and moral damages occurring because of the violations.²

Unfair competition also constitutes a criminal offense. Pursuant to Art. 62 of TCC, any person who violates the unfair competition rules or deceives employees or representatives or other assisting persons in obtaining their employers’ or customers’ production or trade secrets is punished upon complaint with imprisonment of two years, as well as a judicial fine, unless the exercised act does not require heavier punishment.

Furthermore, according to Art. 25/2 of the Turkish Labor Code, any employee behavior in opposition to the principles of honesty and loyalty is considered immediate grounds for termination of the labor contract; revealing an employer’s professional secrets falls into this category.

Pursuant to Art. 73 of the Banking Code, banking secrets and customers’ personal data are to be protected and kept confidential by the chairman and members of the Banking Regulation and Supervision Board, personnel of the Banking Regulation and Supervision Agency, and by the Fund Board Chairman, members, and Fund personnel. Individuals who, by virtue of their positions or duties, have access to confidential information about banks or customers are not permitted to disclose it to any person or entity other than those expressly authorized by law. Art. 159 of the Banking Code stipulates imprisonment from one to three years in addition to a judicial fine if this obligation is breached.

According to Art. 239 of the Turkish Penal Code (TPC), any person delivering or disclosing information or documents deemed as trade secrets, banking secrets or customer secrets, as well as information about scientific research, discoveries, or industrial practices which she or he holds by his position, duty, profession or art, to unauthorized third parties, is also punished upon complaint.

2 ÖZDOĞAN I., IP in business transactions, p. 2.

Moreover, there is a new draft of the Code specializing in Trade Secrets, Banking Secrets and Customer Secrets which provides details of such secrets and any exceptions. The enactment process of The Draft that started in 2008 has been brought before the Parliamentary Commission. The principles covering the protection and the use of trade secrets, banking secrets, and customer secrets are defined, as well as the exceptions to confidentiality and the sanctions for regulation³.

2. The Crime of Disclosure of Information or Documents deemed as Trade Secrets, Banking Secrets or Customer Secrets

1.1. Legal Regulation

The privacy of corporations and business secrets is protected under crimes related to the economy, industry, and trade section of the TPC. Pursuant to Art. 239 of TPC which reads as follows:

“(1) Any person who discloses confidential information, or documents, relating to commerce, banking or private customers, which he holds by virtue of his title, duty, profession or trade, to an unauthorized person shall be subject to a penalty of imprisonment for a term of one year to three years and a judicial fine up to five thousand days, upon complaint. Where such information or documents are disclosed to unauthorized individual by a person who unlawfully acquired such information or documents such person shall be subject to a penalty in accordance with this section.

(2) Section 1 shall apply to information relating to scientific invention and discovery, and the industrial implementation of such.

(3) Where such confidential information is disclosed to a non-citizen (who is not resident in Turkey) or his staff the penalty shall be increased by one third. In such case, no complaint is required.

(4) Any person who, by using force or threats, compels another to disclose the information or documents within the scope of this article shall be subject to a penalty of imprisonment for a term of three to seven years”⁴.

Art. 239 of the TPC stipulates penalties against the disclosure of secrets which have been acquired in various matters, by indicating that such acts of disclosure are

3 ÖZTEK, et. al., Protection of trade secrets, p. 2.

4 BIÇAK, Mukayeseli, Gerekeçli, Türkçe- İngilizce Ceza Kanunu, p. 594.

considered penalties. According to that regulation, disclosure of information or documents regarded as trade secrets, banking secrets, customer secrets, scientific discoveries, inventions, or information about industrial applications to unauthorized third parties is defined as a criminal act.

2.2. The Legally Protected Interest

The legal interest intended for protection against these criminal acts refers to the protection of information and documentation deemed secret in economic and commercial life. Through this provision, the legislator aims to prevent unfair competition cases arising as a result of possession of information and documents relating to trade secrets, banking secrets, customer secrets, scientific inventions, discoveries, or scientific applications by unauthorized third parties, and to allow commercial activities to be conducted under the guise of good faith⁵.

2.3. Elements of the Crime

2.3.1. Material Elements

2.3.1.1. The subject of the Crime

The first paragraph of Art. 239 defines the material subject of crime as information or documents regarded as trade secrets, banking secrets or customer secrets to which a person has access because of his position, duty, profession or art. In the second paragraph of Art. 239, the material subject of the crime is described as the information relating to scientific researches or discoveries or industrial practices.⁶

The term *secret or confidential information* refers to information which is protected against disclosure, which should be kept secret, and which should remain confidential. In the doctrine, it is widely accepted that in order for an issue to be kept secret, the owner of the secret should have the subjective will of its being kept as a secret; this issue should not be known by others and it should fulfill objective conditions regarding the requirement that it should remain confidential from third parties⁷.

It is not possible to provide one specific definition that covers all aspects of the

5 YAŞAR, et. al., **Yorumlu-Uygulamalı Türk Ceza Kanunu**, p. 7198; PARLAR, et. al., **Bankacılık Ceza Hukuku**, p. 664; ERSAN, Ticari Sır, p.16; BAYCAN, Trade Secret, p.3.

6 PARLAR, et. al., **Bankacılık Ceza Hukuku**, p.664; ERSAN, Ticari Sır, p.16.

7 DONAY, **Meslek Sırrı**, p. 5, 6; İÇEL, Ticari Sır, p. 30; DÜLGER, Bankacılık Sırrı, p. 6,7.

term due to the lack of a local statutory law defining trade secrets, banking secrets or customer secrets.⁸ The Code itself simply states trade secrets, banking secrets or customer secrets without specifying a defined meaning. With a broad definition, a trade secret can be defined as any disclosed information related to a commercial entity's business that intentionally kept secret by its owner, which creates a commercial advantage for its owner in terms of competition and has an independent commercial value⁹. Banking secrets, on the other hand, can be defined as all information relating to a bank's financial, economic or credit status¹⁰.

In the Art. 2 of the Draft, “*trade secret*” is described as “*the information and documents regarding the field of operations of a commercial enterprise or company, that are and that can be known and acquired only by a specific number of members and other officials, that is exposed to the risk of the emergence of losses particularly if they are learnt by the rivals and that should not be disclosed to the third parties, that are extremely vital for the enterprise and for the success and efficiency in the economic life of the company, that contain important information about the internal structure or organization of enterprise, its financial, economic, credit and cash status, its research and development studies, its operations strategy, its resources for raw materials, the technical characteristic tactics and expenses, its marketing tactics and expenses, its market share, its client potential and client networks on the wholesale and retail sale basis, as well as its contractual contacts for items that are subject to permission and that are not subject to permissions, and other relevant information and documentation*”¹¹.

According to the Art. 2 of the Draft, “*banking secret*” is described as “*the information relating to the financial, economic, credit and cash status that are known by the members, personnel and other officials appointed in the management and auditing of the banks, the client potential of the bank, the deposit collection and principles of the management of the bank and other banking services and activities, as well as all information and documentation regarding the risk positions of the bank*”¹².

8 ÖZTEK et al., Protection of trade secrets, p.3.

9 ÖZTEK et al., Protection of trade secrets, p.3.

10 DONAY, **Bankacılık Ceza Hukuku**, p.95; ERMAN, **Bankacılık Suçları**, p.313; DÜLGER, **Bankacılık Sırrı**, p.7.

11 BAYCAN, Trade Secrets, p.122.

12 BAYCAN, Trade Secrets, p.122.

As for “*customer secret*,” this refers “*all types of information and documentation regarding the client relations of the commercial enterprises and companies, banks, insurance companies, the intermediary institutions operating in the capital markets and financial markets regarding their own areas of activity and all information and documentation acquired directly and indirectly by such enterprises, relating to the personal, economic, financial, cash or credit status of their clients*”¹³, pursuant to the Art. 2 of the Draft.

2.3.1.2. Perpetrator and Victims of the Crime

Any person who delivers or discloses information or documents deemed as trade secrets, banking secrets or customer secrets, as well as information relating to scientific researches or discoveries, or industrial practices which he holds by his position, duty, profession or art, can be considered the perpetrator of this crime, pursuant to the first and the second paragraph of Art. 239. Only the subject holding this special status may be considered the perpetrator. With regard to delivery or disclosure of unlawfully acquired information or documents to unauthorized individuals, anyone can be the perpetrator of this crime¹⁴.

Furthermore, any person who compels another person to disclose such information or documents can be the perpetrator of this crime, pursuant to the fourth paragraph of Art. 239.

Any persons or legal entities who are rights holders on such secrets or scientific researches or discoveries or industrial practices could be the victims of this crime.

2.3.1.3. The Act

The act constituting this crime is to deliver or disclose information or documents regarded as trade secrets, banking secrets or customer secrets. Delivering such information or documents to unauthorized individuals means entering into the actual domain of the unauthorized individual as verbal, written, etc. For an offense to occur through disclosure, these information or documents must be shared or explained to unauthorized persons.

According to the second sentence of the first paragraph, to deliver or disclose of this information or documents to unauthorized individuals by the persons who

13 BAYCAN, Trade Secrets, p.122.

14 İÇEL, Ticari Sır, p.31; ERSAN, Ticari Sır, p.24.

unlawfully acquired such information or documents is punishable. It is not required that the offender has gained any benefits from her or his act.

In order for the crime to occur, the offender must compel another to disclose the information or documents by using force or threat, as stipulated by the fourth paragraph.

2.3.2. Moral Elements

These crimes are deliberately committed. The existence of a criminal offense depends on the presence of intent. In these crimes, intent includes both knowledge of information and documents in the legal definition of crime that are by nature secret, and the persons who take and find out such information and documents are unauthorized. An individual does not have to have a motive to obtain any benefits from the act in order to commit the crime.

2.3.3. The Justification Reasons

In terms of the general grounds of justification; the consent of the person concerned and the execution of statutory provision may be applied for this crime¹⁵. The obligation for secrecy terminates when a secret owner gives her or his consent for disclosure of information. Furthermore, there are numerous exceptions to the banking secrecy requirement, based on legal obligations to disclose information to certain public authorities. For example, under Art. 73 of the Banking Code, bank associates, board members and employees may disclose customer information to credit institutions and finance institutions.

As mentioned, the Draft defines first the terms *trade secret*, *banking secret* and *customer secret*, and then it regulates some exceptions as to confidentiality. According to Art. 3 of the Draft, when information must be declared to the public to comply with the clarity principle, or when a secret owner agrees to disclose information or a legal obligation must be fulfilled, it is not regarded as disclosure of customer secrets. Articles 4 and 5 of the Draft regulate the cases under which secrets may be disclosed. Under Article 4, secrets may be disclosed when revealed in parliamentary enquiry sessions (which are kept confidential), in enquiries and prosecutions conducted by the courts, during audits made in the name of the treasury, and where provided for by other laws. Under Art. 5, trade, banking and customer secrets must be disclosed to the Grand National Assembly of Turkey, the courts and the public prosecution offices.

15 DÜLGER, Bankacılık Sırrı, p. 18, 20.

Secrets are to be revealed in relation to financial and administrative audits, provided that the information is related to the duty, it is limited to the purpose of the audit, and disclosure of such information is an obligation¹⁶.

2.4. The Special Forms of Crime

In this type of crime, only the subject holding special status or the perpetrator committing the required act may be considered the perpetrator. All other persons who have participated in the commission of the crime may only be held responsible either as an instigator or assistant. In alignment with this, the Draft does not specify a particular manner of participation to the act defined in the fourth paragraph.

As for the persons those who commit this crime more than one time by the same act, which is known as the doctrine of concurrence in the criminal law, they shall be punished according to only the one requiring the heaviest punishment, pursuant to Art. 44 of the TPC. Also, in cases in which the actions constituting a crime under this code and also at the same time require punishment (imprisonment) pursuant to the other law, the provision which stipulates the heaviest punishment shall be applied, due to Art. 161 of the Banking Code.

2.5. Sanctions

Anyone who discloses trade, banking, or customer secrets obtained as a result of his position, duty, profession or art will be subject to imprisonment for one to three years as well as a judicial fine up to 5,000 days on a complaint. According to the fourth paragraph of the Art., any person who compels another to disclose such information or documents shall be subject to imprisonment for three to seven years.

3. The Draft Law on Trade Secrets, Banking Secrets, and Customer Secrets

It is key to note the explanation indicating reasons behind that provision which reads as *“to regulate the basis and procedures about disclosure, usage, protection and limitation of the trade secrets, banking secrets and customer secrets of public or private intuitions’ and financial sector’s productive, consumption and service companies and companies of banking, insurance and capital market and trade relations of their customers”*¹⁷.

16 UYSAL/HERDEM, Banks’ Duty of Confidentiality, p.1.

17 ÇIBIKÇI ÖNDER, Legal Liability of Data Centers, p. 189.

If the Draft Law is enacted, it will be applied to requesting, releasing, usage and protection of information, documents and electronic registries about the trade, banking and customer secrets of banking, insurance, finance companies and commercial or manufacturing companies in the possession of public or private institutions. According to the penal provisions of Art. 8, public officials and other people who discover the given secrets directly or indirectly and who violate the confidentiality obligation in Art. 6, shall be punished by Art. 239 of the TPC if she or he discloses information or uses it in order to obtain material benefits or to cause damage. Public officials who violate the confidentiality regulated by the Article 7 shall be subject to imprisonment for one to three years and a judicial fine up to 10000 days¹⁸.

4. Conclusion

As explained above, there are different provisions for the protection of trade secrets, banking secrets, and customer secrets. In this regard, the main problem with banking secrets and customer secrets is the concurrence of crimes. However, if the abovementioned Draft Law which attempts to harmonize the criminal framework regarding such secrets is enacted, the only applicable provisions about such secrets will be this regulation, unless the conduct does not require heavier punishment according to the TPC. Furthermore, the terms and regulations concerning trade, banking, and customer secrets, as well as the exceptions of confidentiality will be clarified.

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18 Reasoning of the Draft Law on Trade Secrets, Banking Secrets and Customer Secrets.

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