Poland

Question Q215
Protection of trade secrets through IPR and unfair competition law

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General

Ad 1. Legal developments on trade secrets

The law which was in force before the ratification of TRIPS Agreement in Poland included regulations related to trade and state secret, applying to individual, private and state companies.

The implementation of TRIPS rules to the Polish statutory law had started long before TRIPS regulations entered into force in Poland (2000). One example of this is the Act of 22 January 1999 on Protection of Classified Information, which introduced the recommendation of art.39.1 of TRIPS Agreement and replaced earlier regulations. This however did not result in any regulations related to the questions raised in Question 1.

The development of trade secret protection regulations in Poland, was greatly influenced by the process of Poland's accession to the European Union structures and implementation of the European rules to Polish law. One of these rules is the Act on Counteracting Unfair Competition of 16 April 1993 (Journal of Laws of 2003 No. 153, item 1503), which regulates inter alia the question of trade secret protection (article 11). Until April 1993, a corresponding regulation of Polish Labour Law was treated as satisfactory.

Ad 2. Definition of trade secrets

In Poland, there is no formal (statutory) definition of trade secret. However, in Polish legal practice trade secret is treated as commercial confidential information (company information of commercial value, not revealed to the public) and is part of company
**secret – technical, technological or organisational information** about the specific activity of a company (see: Act on Counteracting Unfair Competition –Art.11.4).

In the theory of Polish law one of the legal grounds for understanding the trade secret is the definition of *official secret* in contrast to the definition of the *state secret*, both mentioned in Art.2 of the Act of 22 January 1999 on the Protection of Classified Information (Journal of Laws of 2005 No. 196, item 1631), which states that:

*official secret* - shall mean classified information, other than a state secret, which has been obtained in connection with official service actions or performance of agency contracts, the unauthorized disclosure of which information may be to the detriment of the state interest, public interest or lawfully protected interest of citizens or of an organization (such as company);

*state secret* - shall mean information defined in the schedule of classified information, constituting Annex 1 hereto, the unauthorized disclosure of which information may cause a grave threat to fundamental interests of the Republic of Poland, relating to public order, defence, security, international relations or economic interests of the state

According to notation 13 of Introduction to Q 215 problems of protection of classified information is not a subject of this study.

**Ad 3. Control of trade secrets**

In Poland – with respect to the employer-employee relationship – the employer as an entrepreneur is a legal person entitled to control trade secrets. According to the law only the managing body of the company is entitled to organize and conduct the company business and control all aspects of its everyday activity. The managing body bears full responsibility for that before the supervisory board, general assembly of the company and shareholders.

In practice employers admit the employees to possess only this part of trade secrets which is necessary in their work and only for the duration of employment agreement.

Signing an agreement on non-completion during and after the period of employment is an act of due diligence. Such agreement should specify the period of non-competition and provide for a financial compensation from employee (more details - see below).
According to the law and legal practice, the managing body is authorized to regulate the matters related to the ownership of inventions/innovations/new organizational solutions created by employee as a result of inspiration or order of employer. Co-ownership of an invention/innovation/new organizational solution is also possible and the form of such co-ownership is at the discretion of parties involved.

Polish legal system in not based on case law.

**Ad 4. Source of law for trade secret protection**

Polish law is the statutory law. Therefore case law or court precedents should not be the source for the protection of trade secrets.

According to general regulations of the Civil Code (CC) - company secrets are classified as an element of tangible and intangible elements of company property (art.55¹ point 8 - Title "Property").

Article 55¹. An enterprise shall be an organized complex of material and non-material components designed for carrying on an economic activity. It shall particularly include: ... 8) business secrets of an enterprise...

Protection of trade secrets in Poland derives from Act on Counteracting Unfair Competition (Art.11) and labor law regulations (Art.100 par. 1 and 2 p. 4 and 5, Art.101¹-101² of the Labour Code).

Art.11 of Act on Counteracting Unfair Competition states that

"1. An act of unfair competition consists of transferring, divulging, or making use of confidential information owned by a business entity or acquisition of such information from an unauthorized source if the disclosure endangers important interests of the business entity.

2. Regulation of par.1 shall be also applicable to individuals hired by the business entity under an employment contract or otherwise throughout the period if three years from termination of such contract unless the contract provides otherwise or the obligation to maintain confidentiality is no longer in force.

3. Regulation of par.1 shall not apply to unauthorized persons who acquired a business entity’s confidential information in good faith within the framework of legal services provided for a fee. The court may order the purchaser to pay an appropriate compensation for use of such information, however, the fee stops to be due when the confidential information becomes the public domain."
4. Confidential information owned by a business entity means technical, technological, commercial, or organizational information not revealed to the public in relation to which the business entity took necessary steps to maintain its confidentiality.”

Art.100 paragraph 1 and 2 p. 4 and 5, Art.101\(^1\)-101\(^2\) of the Labour Code states that

“Art.100

1. An employee shall be obliged to perform his/her work conscientiously and scrupulously and shall comply with the orders of his/her superiors which apply to work, unless they are contradictory to the provisions of law or the contract of employment.

2. An employee shall be obliged in particular: ...

4/ to care for the interests of the employing establishment, protect its property and to maintain the confidentiality of information, the disclosure of which could cause damage to the employer,

5/ to maintain the confidentiality provided for by separate provisions...”

“Art. 101\(^1\)

§1. Within the limits specified in a separate contract, an employee must not carry on any activities competitive with the activities competitive with the activities of employer and must not work in an employment relationship or on another basis for an economic subject carrying on such activities (prohibition of competition).

§2. An employer who suffers damage as a result of an employee’s violation of a prohibition on competition provided for in a contract, may claim compensation for such damage from the employee on the principles specified in the provisions of Chapter I in section V.

Art 101\(^2\)

§1 The provision of Art. 101\(^1\) § 1 shall also apply when an employer and an employee, who have access to particularly important information the disclosure of which could cause damage to the employer conclude a contract prohibiting competition after the employment relationship has ceased. Such contract shall also specify the period of prohibition of competition and the compensation due to the employee from the employer subject to the provisions of paragraph 2 and 3 below.”
Apart from the above, the protection of clients trade secrets result from the statutory and internal regulations of:

- banks,
- stock exchange management,
- groups of professionals and their organizations (patent & trademark attorneys, attorneys-at-law, legal advisers etc.).

### Ad 5. Available remedies

In Poland, remedies available against trade secret violations are set forth in the material and procedural regulations and these remedies have civil and punitive, not administrative character.

According to the unfair competition law regulations:

An entrepreneur, whose interest has been violated or threatened, due to an act of unfair competition, may request the entrepreneur who committed an act of unfair competition, to:

- Cease prohibited activities,
- Remove the effects of those activities,
- Make a certain public declaration,
- Compensate a loss caused,
- Release unlawfully gained profits,
- Pay an appropriate amount of money for agreed public purposes - if an act of unfair competition was caused by fault. (art. 18.1).

The Act introduces criminal liability for committing some of acts of unfair competition provided for in this act. Committing one of these offences (or misconducts) described in this act is made subject to a penalty or a fine, restriction of freedom and even imprisonment (up to eight years) - art. 23. Prosecution of offences (or misconducts) provided for in the Act on unfair competition is initiated upon a motion (request) of a harmed person.

### Pros and cons of said remedies

Pros:

- generally preventive influence on a potential infringer of trade secret,
- possibility to restore the good name of a person or entity whose interests suffered as a result of a trade secrets disclosure
- full or partial compensation for damages suffered by the trade secret holder

**Cons:**
- civil procedure: lengthy court procedure before every instance involved;
- penal procedure: long-lasting procedure, prolonged due to prosecutor action; court decisions usually adjudicating the lowest penalties.

According to the regulation of unfair competition law (art. 11.3) a person who obtains trade secret in good faith is not treated as an infringer of trade secret; the remedy available against such person is payment of adequate sum of money for using the trade secret information for a period which is not longer than the expiration of the trade secret.

Civil procedure rules provide the injured party with the possibility to obtain the preliminary injunction to stop the infringement. Temporary restraining orders are not the elements of Polish civil procedure.

Damages are calculated as a real material loss (damnum emergens) and as a loss of profits (lucrum cessans). To obtain a satisfactory compensation, the plaintiff is obliged to present strong and univocal evidence for all claims presented.

**Ad 6. Protection of trade secrets before and during litigation**

In Poland, patent infringement cases are decided in a civil law procedure in accordance with general principles of civil law procedure (according to article 284 of IPL). The general provisions of the Code of Civil Procedure (CCP) guarantees the possibility for the court to decide the case in a closed session upon a justified demand of a party (art. 153 CCP) and when securing a party’s claims (art. 730 CCP).

Particular provisions of the CCP relating to separate proceedings in cases involving commercial entities also provides that the court may decide the case in a closed session also when there is a risk of disclosure of information constituting trade secrets of an undertaking (art. 479° of CCP).

The provision of the CCP relating to proceedings before The Office of Competition and Consumer Protection (OCCP) further provides the possibility for the court to limit the access
to the files if the disclosure of the files would result in a disclosure of a trade secret (art.
47933 section 3 of CCP).

There are also various rules regarding inter-partes proceedings that may be relevant for this
report:

A. The implementation of the Directive on the enforcement of intellectual

There are also several additional measures for preserving evidence and information claims in
IPR proceedings, newly adopted through the implementation of the Directive on the
The implementation of the Directive was performed by Poland in 2007. The newly adopted
art. 2861 section 1 point 1 of the IPL provides that the IP holder may demand from the Court
that it secures the evidence needed in an infringement matter (called measures for
preserving evidence in the Directive). This is not a complete implementation of Article 6 and
7 of the Directive, which further specify that such information may also concern banking,
financial or commercial documents of the opposing party. Such a specification in the Polish
Act would have been highly desirable, as Polish courts are very reluctant to seize and secure
such sensitive documents as the one described.

The newly adopted art. 2861 section 1 point 2 of the IPL further provides that the holder
may demand that an infringer or a third party be ordered to divulge information
indispensable to pursue the claims. The wording "indispensable to pursue the claims"
signifies according to Polish jurisprudence something that is absolutely necessary, essential,
or a requisite, in effect, the new provision with respect to IP holders' right of information is
seriously limited (when compared to copyright holders, where the law does not provide for
such a limitation).

The newly adopted art. 2861 section 2 point 5 of the IPL provides that the IP holder
demanding information from third parties needs to reimburse any documented costs the
third party may have in connection with divulging the information2.

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29 April 2004 on the enforcement of intellectual property rights ( Official Journal of the European Union L 157
of 30 April 2004 );

2 No such obligation to reimburse costs is placed on copyright holders.
Further, the newly adopted art. 286¹ section 2 point 1 and 2 of the IPL provides, what kind of information the holder may ask to obtain (limiting this to information on the names and addresses of the producers, distributors, importers, buyers of the products, the amount and the price of the infringing products).

The newly adopted art. 286¹ section 3 provides that “When admitting evidence or examining requests referred to in paragraph (1), the court shall protect confidential information of the entrepreneur and other confidential information protected by virtue of law.”.

The newly adopted art. 286¹ section 7 of the IPL provides for a regulation that the court must rule with regard to forms of security relating to information claims once a hearing has been held³. This is not in line with the Directive that specifies that precautionary measures shall be taken, if necessary without the other party having been heard, in particular where any delay is likely to cause irreparable harm to the rightholder⁴.

The mandatory scheduling of a hearing to create an instrument securing a claim seems to be contrary to the essential goal of that instrument and renders the right to that security futile or unattainable. This is so because the potential infringer or the third party will, through the hearing, be alerted of the case in advance and may take appropriate measures to circumvent the motion to secure information and destroy the evidence and information which shall be seized by order of the Court⁵.

Even more worrying is the fact that the information claims provided for by the Directive to secure evidence, which were supposed to be introduced convincingly into Polish national law and were long-awaited, are weakened as the court may now only decide on such claims after a hearing has taken place (with regard to industrial property rights). Moreover, the securing of information claims for industrial property claims is limited only to demands for information that is indispensable to pursue the claims.

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³ With respect to the applications for security concerning copyright law, protection of databases or protection of new varieties of plants no requirement of a hearing was introduced.

⁴ Article 7 point 1 of the Directive.

⁵ For copyright claims, the Act does not stipulate any obligation for a hearing to be held beforehand.
B. Limitation on access to industrial property files before the PPO

In general, the access to information on public matters, such as contents of administrative acts and other resolutions, documentation on the control and its effects as well as presentations, opinions, conclusions and statements of entities having conducted the control, are regulated by the Polish Act of 6 September 2001 on access to public information (API). According to art. 1 section 1 of API “Each information on public matters constitutes public information” and according to art. 2 section 2 such an information shall be made available to any person regardless her legal or factual interest.

Further the article 5 section 2, access to the information on public matters is limited to the extent that it does not violate the legitimate right to privacy or a trade secret of an undertaking. It has been accepted by the courts that the files of an administrative affair (such as the content of an administrative decision granting a patent right or invalidating the patent right) and judgments constitutes information on public matters connected to the interest of the parties in the protection of their business secrets.

The regulation on access to public information naturally does not concern the disclosure of private documents submitted by parties in proceedings before the PPO. All the documentation (private and official) may be disclosed only to the parties to the proceedings. There is a general rule, stated in art. 73 of the Code of Administrative Procedure, that in each phase of the proceedings the state administration body shall be obliged to enable the party to review the case files and to prepare notes and copies from them, and its interpretation by the administrative jurisprudence is very strict.

Because of the specific nature of IPR, different rules apply to the access to information in registration procedures before the PPO. The rules and the procedure on the access to documents including trade mark and patent applications are governed by the IPL and IPL provisions therefore constitute lex specialis in relation to the API. Article 251 section 2 of IPL provides the general rule of a limited access to the documentation. Until the registration, the PPO owes no duty to disclose to a third party any of the information on the applications.

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6 Journal of Laws, No. 112, item 1198, with later amendments

7 For disclosure of the files of an administrative affair see: II SA/Wa 221/04, LEX nr 146742 and NSA II OSK 812/05, LEX nr 236465; For disclosure of judgments see: The The District Administrative Court(VAC) in Szczecin, in a judgment of 16 December 2009, case file II SAB/Sz 148/09, held that according to article 6(1) point 4 letter (a) of the API, a judgment is an official document that should be made available according to the procedures and principles set in the API.

8 The District Administrative Courtin Warsaw in a judgment of 24 November 2006, case file II SAB/Wa 99/06.
After the expiry of the time limits within which information on the applications concerning inventions, utility models, trademarks etc. may not be disclosed, the Patent Office may, at the request of a person having a legitimate interest, make accessible to that person the documents included in the application files.

Although art. 251 of the IPL relates only to the disclosure of documents submitted during the processing of applications, the interpretation of this provision has been extended in the course of practice of the PPO to the period after granting the protection by the PPO, so that it is very unlikely to have access to the information in the file on the IPR in inter-partes proceedings before the PPO. Thus, in Poland, there is a very rigorous regime with regards to the right to access the files by other parties before the PPO (such as documents, leading to the decision granting the patent, that can contain secrets).

C. Data exclusivity protection for generic and innovative firms

The protection of data exclusivity for generic firms is provided for by the provision of article 8 section 1d of the Pharmaceutical Law, stating that when submitting the application the Marketing Authorization Holder may request the Drug Registration Office President not to disclose the information contained in the assessment report, which constitutes a business secret within the meaning of Article 11 (4) of the Act on Counteracting Unfair Competition of 16 April 1993 (Journal of Laws of 2003 No. 153, item 1503, as amended), and in particular the information on supply sources.

In the proceedings made before the Drug Registration Office, the general rule of art. 34 the Pharmaceutical Law of 6 September 2001 (Journal of Laws from 2008, No. 45, item 271) further provides that "The Register and the documents submitted within the marketing authorization procedure shall be accessible to persons who have the respective legal interest, subject to the regulations on secret information and intellectual property protection". This provision provides a very strong protection of data exclusivity against competitors or any third parties, also generic firms, vs. innovative firms and innovative firms vs. generic firms, as the Office is very reluctant to provide any

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9 The provision seems to be inconsistent with the article 125 of the Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, stating that: "Marketing authorizations and decisions to revoke such authorizations, shall be published by each Member State in the appropriate official publication"), but no effort was made to amend this regulation so far.
information on the documentation submitted in the marketing authorization procedure and imposes a very restrictive interpretation of the notion of “the respective legal interest”. Specifically, it is often criticized that the Office refuses to provide an IP holder of an innovative medicine and patent access to the documentation of the Marketing Authorization of the product that is a generic and allegedly breaks the patent. The interest of an IP holder consisting in defending its data exclusivity and patent right is usually seen as not sufficient and will not be respected as a “legal interest” by the Office.

In Polish jurisprudence, case-law and public opinion, doubts have been raised as to the scope of the protection of generic firms’ trade secrets with regards to data exclusivity. The action brought on 2 September 2008 by the Commission of the European Communities against the Republic of Poland, with regard to the registration of medicinal products that are generic and whose marketing authorization was not issued in accordance with Article 6(1) of Directive 2001/83/EC, indicates a noticeable need to balance the protection of data exclusivity for innovative firms with the protection and ability to claim data protection and trade secret protection by generic firms. The issue is very sensitive as the interests of both innovative and generic firms need adequate and sufficient protection. It seems however, that this matter is not sufficiently legally regulated by Polish law, which is why, such a large number of disputes with regard to appeals from the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products’ decisions on refusal to grant access to data are brought before the District Administrative Court (“Wojewódzki Sąd Administracyjny”).

A further analysis of this complex issue extends beyond the subject matter of this report, and will be addressed in the „Recommendations“ section below.

Ad 7. Licensing trade secrets

A. Licensing

Article 76 of the Polish Industrial Property Law requires license agreement relating to IPR rights to be executed in writing under pain of nullity. Under the general rules of the Civil Law.
Code, in particular Art. 73 § 1, the requirement of a written form for the legal act to be valid (ad solemnitatem) cannot be challenged by any contractual provision. Thus, a license contract cannot be concluded per facta concludentia. Neither the parties themselves nor a third person (for example the tax authorities) may conclude that a license agreement has been completed if no written contract has been concluded.

Thus, a license (or sublicense) agreement licensing IPRs and trade secrets – not concluded in writing – is completely invalid, inter partes, as well as extra partes.

B. Penalty clauses

Stipulating a contractual “penalty clause” in a trade secret license agreement is usually perceived by the parties as the most effective remedy for a breach of a contract and divulging a secret by one of the parties.

This remedy is regulated under article 483 of the Civil Code (CC) that provides that it may be stipulated in the contract that the redress of the damage resulting from the non-performance or an improper performance of a non-pecuniary obligation shall take place by the payment of a specified sum, further referred as the “penalty clause”. Art. 484 of the CC further provides that in the case of non-performance or improper performance of the obligation the penalty clause shall be due to the creditor in the amount stipulated for that case regardless of the damage suffered. In effect, the “penalty clause” will be enforced even though the creditor did not suffer any damage or did not show that he suffered it.12

The “penalty clause” for breach of a contract can be enforced on a general contractual basis in Poland, unless it is deemed as severely and unlawfully penalizing the other party and going exceptionally outside of the scope of a normal contractual relationship of this type.

C. Protection of a trade secret during the process of negotiation

The rule on breach of confidentiality accepted in the law of EU member states and modeled on article 2:302 of the Principles of European Contract Law (PECL) was adopted into Polish law in article 72[1] of the CC. According to this provision, if confidential information is supplied by a party in the course of negotiations, the other party has a duty not to disclose that information and transmit it to other persons or to use it for its own purposes, unless the parties to the contract agreed otherwise. In a case of non-performance or improper

12 The judgment of the Supreme Court of Nov. 6, 2003, III CZP 61/2003 (OSNC 2004, nr. 5 poz. 69).
performance of the above duties, the aggrieved party may demand from the other party compensation for damages or restitution of the benefit received by the other party.

D. Acquiring confidential information from an unauthorized person

It is worth mentioning that under the Act on Counteracting Unfair Competition, the general rule prohibiting the transfer of information which is a trade secret or its receipt from an unauthorized person does not apply to the person who, \textit{bona fide}, by way of a legal action against payment, acquired information constituting a business secret. The court may oblige the acquirer to the appropriate remuneration for its use, nevertheless for a period not longer than the duration of the secrecy.\footnote{See Article 11.3 of Act on Counteracting Unfair Competition.} This exception only applies to contracts with financial considerations. In this aspect, the protection granted under Polish law seems to be broader than under Article 39 of the TRIPS Agreement.

E. The role of anti-trust considerations in the protection of trade secrets

The impact of anti-trust considerations on trade secret and know-how licensing in Poland depends on the number of proceedings instituted \textit{ex officio} by the President of The Office of Competition and Consumer Protection (President of the OCCP), who exercises the control over undertakings and competition. As a result of such proceedings, the President may issue a decision ordering the enterprises involved to cease the unlawful activities and pay a fine of up to 10\% of its preceding year’s revenue. In 2008 the President of the OCCP launched 187 explanatory proceedings and 29 antitrust proceedings, and closed 493 explanatory proceedings and 104 antitrust proceedings\footnote{Report on activities in 2008, http://www.uokik.gov.pl/reports_on_activities.php}.

Article 6 section 1 of the act of 16 February 2007 on competition and consumer protection provides that agreements which have as their object or effect an elimination, restriction or any other infringement of competition in the relevant market are prohibited. In particular, prohibited are those agreements that consist in limiting or controlling the technical development or investments. At the same time, article 8 of the Act provides that such prohibition will not apply to agreements which at the same time:

1) contribute to improvement of the production, distribution of goods or to technical or economic progress;
2) allow the buyer or user a fair share of benefits resulting thereof;
3) do not impose upon the undertakings concerned impediments which are not indispensable to the attainment of these objectives;
4) do not afford these undertakings the possibility to eliminate competition in the relevant market in respect of a substantial part of the goods in question.

Taking into consideration the above mentioned benefits resulting from such types of agreements, the Council of Ministers exempted form the prohibition certain agreements concerning technology transfer, in particular non-disclosure and non-use agreements relating to know-how and IPR licensing. In general, the application of the exemption depends on the severity of anti-competitive restraints and the degree of market power of the undertakings concerned.

Upon Council Regulation No. 1/2003, the President of the OCCP also has the authority to apply Articles 101 and 102 of the EC Treaty (ex Article 81 and 82 TEC) with respect to the exemptions applied by the Commission regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, when the investigated practice may have an influence on trade between EU member state.

**Ad 8. Effectiveness of non-disclosure and non-use agreements**

In Poland, the unilateral imposition by the employer of non-disclosure clauses after leaving the company or retirement is not possible. Only bilateral agreements consistent with requirements listed in articles 1011-3 of the Labour Law, i.e. for example stipulating a financial remuneration, will be respected and enforced by the courts. There is no limitation on parties’ right to alter or terminate such agreement.

The US doctrine of inevitable disclosure is not recognized by Polish courts. Nonetheless the possibility to stipulate a non-competition clause in accordance with article 1011 of Labour Law seems to serve similar purpose.

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15 The regulation of the Council of Ministers of July 30, 2002 concerning the exemption of certain agreements concerning technology transfer from the ban of agreements restraining competition (Official Journal of Laws of 29 August 2002)
Harmonization

Ad 9. Common and practical definition of trade secrets

We consider that there is a need to adopt a common and practical definition of a ‘trade secret’. The definition provided in the TRIPS Agreement is not completely sufficient for purposes of trade secret protection.

There should be a minimum standard set for information to qualify as a trade secret. Not every information should be protected under the ‘trade secret’ clause, but only those of substantial commercial importance to the company in the given field. Specifically, such information should have an impact on the company’s competitive position in the market, e.g. by improving its technology, organizational structure, processes or methodologies that are used. The importance of the information should be determined by a court in an objective way, with regards to the relevant market, the goods, services and products, and the competitors of the company.

Ad 10. What is desired in our jurisdiction?

One current problem in Polish legal practice is the insufficient definition of trade secret and the consequent problem of unjustified limitation of freedom of trade activity or substantial limitation of market competition.

Another important problem is the lack of reasonable limits of the infringing party’s liability. It is sometimes difficult to define the difference between information which gets into public domain by way other than disclosure of a trade secret by an unauthorised party.

Furthermore, there is a problem of making trade secrets accessible „for the duration of an agreement” and „the return” of such information after the termination of such agreement. There is no practical solution that would make it possible to effectively solve this problem in current legal laws.

Ad 11. What is required for an improved global standard for trade secret protection?
A.

There is a need of consistency of national legal court procedures with regards to the adequate and effective protection of trade secrets from and during forcible disclosure during litigation. The large differences between different laws in relation to protection in forcible disclosure should be remedied. Specifically, there is a need for a better protection of documents containing trade secrets, submitted to the court as evidence in proceedings in civil law countries, in opposition to common law countries that have an efficient and well-regulated disclosure procedure that protects the rights of both parties. For example, documents may be disclosed only to the court and the counterparty’s attorney and not to the counterparty itself.

B.

Taking into consideration the growing importance of “contractual penalty clauses” in non-disclosure and non-use agreements, a full acceptance of penalty clauses in national procedure codes would be desired.

C.

We see a large need of improvement and consistency of protection of confidentiality of IP professional advisors working with clients on the protection of their IPR rights. Currently, in many countries (in Poland among others), there are considerable differences as to the scope of protection of confidentiality of an attorney and of a patent attorney. The lack of equal and thus adequate protection of IP professional advisors against being forced to disclose their client’s secret information in proceedings before the court is obviously harmful to clients’ IPR rights and trade secrets.

D.

We would propose a further in-depth study of AIPPI for a better protection and balance of innovative and generic firms’ trade secrets with regards to data exclusivity. As previously mentioned, this matter is of very sensitive nature, as it concerns the access to pharmaceuticals and thus public health issues and – as we consider - requires further attention of the AIPPI to strike a fair and useful balance in this regard in IP protection between innovative and generic companies.
Ad 12. What would be a desirable and realistic way to proceed?

Taking into account different interpretations of the notion of trade secret in situations when commercial agreements are concluded between common law and continental law countries, as well as different stages of industrial development in each country - which is decisive for the determination of trade secret limits – a multilateral convention might be the best and most realistic way to proceed.

Ad 13. Other comments

n/a

Summary:

In Poland, the statutory definition of a trade secret is not provided (jurisprudence however, as well as a few court cases, define it however as any commercial confidential information that may be adduced to a company secret, defined as any technical, technological or organisational information about the specific activity of a company). The protection of trade secrets is provided under civil law, labour law and unfair competition law and the remedies available against trade secret violations have civil or punitive character. In litigation, a protection may be afforded by limiting access to the files. As a rule, the unilateral imposition by the employer of non-disclosure clauses after leaving the company or retirement is not possible, but has to be of a bilateral nature. Having in regard the considerable divergence of national legal procedures in relation to protection of trade secrets during litigation and the fact of the growing importance of trade secret protection, the Polish group recommends that some standard means of protection from forcible disclosure are introduced on international level. Further, a statutory definition of a trade secret on an international level would be recommendable. Specifically, the protection of documents containing trade secrets submitted to a court or administrative body as evidence, the protection of confidentiality of IP professional advisors and full acceptance of penalty clauses in confidentiality agreements should be considered. For this purpose, the Polish group recommends the adoption of a
multilateral convention. The Polish group also proposes a further in-depth study of the AIPPI, re: the protection and balance of innovative and generic firms’ trade secrets with regards to data exclusivity and patents.

Résumé:
En Pologne, la definition legale d'un secret industriel n’existe pas. Bien que en pratique legale le secret industriel soit considéré comme une information commerciale confidentielle, faisant la partie de la notion d’un secret d’entreprise, défini comme chaque information technique, technologique ou organisationnel sur l’activité specifique de l’entreprise. La protection d’un secret industriel est fournie aux dispositions de la loi civile, le code du travail et la loi de la concurrence déloyale. Les remèdes disponibles contre la violation d’un secret industriel ont civil ou punitif caractère. Devant la justice, la protection es accessible en appliquant la restriction d’accès aux documents. En règle générale, l’imposition unilatérale de la clause de confidentialité par un employeur n’est pas possible suite départ d’une entreprise, mais devrait avoir caractère bilatéral. Vu que les divergences entre les procédures juridiques nationales applicables a la protection d’un secret industriel sont considérables (et vu de la importance de la protection d’un secret industriel), le groupe polonais recommande l’adoption des mesures de protection contre le forcible révélation du secret industriel au niveau international et une definition legale d’un secret industriel. En particulier, la protection des documents qui comportent des secrets industriels, soumises à la cour ou des autorites administratives, la protection de la confidentialité du Conseil en propriété industrielle et l’acceptation pleine de la clause de pénalité dans les contrats des confidentialite, devront être considérées. Pour cela, le groupe polonais recommande l’adoption d’une convention multilatérale. Le groupe polonais recommande aussi que l’AIPPI conduit une étude plus approfondie sur la meilleure et la plus équilibrée protection de secrets industriels des entreprises de génériques et des entreprises innovantes en ce qui concerne l’exclusivité des données y des brevets.

Zusammenfassung:
Polen hat keine legale Definition von Geschäftsggeheimnissen, die Gerichtspraxis definiert ein Geschäftsggeheimnis aber als jede kommerzielle, konfidentielle Information vom technischen, technologischen oder organisatorischen Charakter über einem Betrieb. Der Schutz von