



Date: 7th June 2015

## Q247

### Trade secrets: Overlap with restraint of trade, aspects of enforcement

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Date	29-05-2015

## I. Current law and practice

Aspect (i) - Overlap with restraint of trade

1)	Is trade secret protection viewed as a form of restraint of trade and, if so, under what circumstances and under which legal regimes (e.g. competition law)?
	yes Please comment.:
	Trade secret protection may form a restraint of trade under the Greek law. Such a protection is available pursuant either the Unfair Competition rules, in cases where the conduct of the employee and its future employer may be shown to be a competitive act that runs against the good morals or the Labor Law in cases where the employee has signed a contract containing a restriction to that end. Even in the absence of such a term, trade secret protection may be sought pursuant to the general provisions of the Greek Civil Code (Articles 288, 652).

a)	If so, under what circumstances and under which legal regimes (e.g. competition law)?
	Such a protection is available pursuant either the Unfair Competition rules, in cases where the conduct of the employee and its future employer may be shown to be a competitive act that runs against the good morals or the Labor Law in cases where the employee has signed a contract containing a restriction to that end. Even in the absence of such a term, trade secret protection may be sought pursuant to the general provisions of the Greek Civil Code (Articles 288, 652).

2) How does your law distinguish between general skills or knowledge acquired during the course of employment, confidential information, and trade secrets? What protection is extended to each?

There is no provision under the Greek Law providing for a trade secret definition or its variations thereof. According to the Greek case law a trade secret may be any fact relating to the business enterprise, which is known to a limited number of persons, the safekeeping of which as a secret corresponds to the will and reasonable business interests of the enterprise.

3) Are employees under a duty of confidence whether or not such a duty is set out in their contract of employment?

yes  
If yes please answer the following sub-questions::

a) are express confidentiality clauses to protect classes of information broader than would anyway be protected by the employee's duty of confidence permitted; and

A duty of confidence derives from the general provisions of Civil Law (articles 288, 652 of the Civil Code).

Express confidentiality clauses permissibly protect classes of information broader than would any way be protected but this is subject to an abuse of process scrutiny.

b) how long after the end of employment does an ex-employee's duty of confidence in relation to trade secrets last in the absence of any express confidentiality clause?

That depends on the specific facts of the case.

4) If not constrained by an enforceable non-compete agreement, may workers use knowledge acquired in the course of earlier employment in their new employment?

yes  
If yes, is there any distinction between the types of knowledge they can use?:

If the type of knowledge acquired falls within the trade secret definition, the worker may not use it even if has not signed an enforceable non-compete agreement on the basis on the general legal provision mentioned above. Signing a non-compete clause may be of legal relevance in cases where the information concerned does not fall within the definition of a trade secret and the worker undertakes not to use it his new employment.

5) Are certain employees subject to a higher obligation of confidentiality / non-use?

yes  
If so, which employees, and what is the rationale for any distinction between employees?:

The higher the position, the higher the obligation of confidentiality. The rationale is that according to common sense, workers holding an important position are closer to the trade secrets of the business enterprise.

Aspect (ii) - Ensuring confidentiality during Court proceedings

6)	What measures or provisions are available to preserve the secrecy of trade secrets during Court proceedings?
	<p>The regulatory framework available to preserve the secrecy of trade secrets during Court proceedings are the provisions of the Enforcement Directive 2004/48/which has been already fully implemented into Greek law.</p> <p>If a party requests disclosure of its adversary`s commercial documents, the other party has the right to request that such disclosure, if finally ordered by the Court, should not be used for the unfair limitation of competition and the procedures should take into consideration the rights of the defense and provide for the necessary safeguards, including the protection of confidential information, for instance the commercial and industrial documents that are characterized as trade secrets. It is obvious that the principle of proportionality serves in this specific case as a general restriction and intervenes to the relevant balance of conviction.</p>

For example, do trade secret proprietors have access to the following mechanisms to preserve the secrecy of a trade secret during proceedings (subject to the Court's discretion to allow/disallow such access):

a)	restricted access to the hearing and / or evidence;
	<p>Court hearings are public, while access to the case file is permissible upon request and provided that the applicant shows a legitimate interest. In such a case:</p> <p>1) As far as the hearing is concerned, it is possible that the Court orders <i>in camera</i> proceedings, either <i>ex officio</i> or after the acceptance of relevant request by the parties, and after issuance of its relevant preliminary ruling that allows <i>in camera</i> proceedings to be held in the specific case (Article 114 of Greek Code of Civil Procedure).</p> <p>2) As far as the evidence is concerned, there is no general rule or specific provision of law. It is possible though for the parties to request from the Court to order non-disclosure of the proceedings` documents to the public, ordering/allowing access to them strictly to the parties in dispute and/or their legal representatives.</p> <p>Furthermore, pursuant to Article 402 par. 2 of Greek Code of Civil Procedure, any person examined as a witness before the Court, can lawfully deny to testify on facts/evidence that can be considered as trade secrets. This is a general provision that sets limits on both the obligation for witnessing and the truth duty of a witness examined before Court in favor of the confidential character of trade secrets.</p>
b)	disclosure of evidence only to the legal representatives of the opponent, but not to the opponent themselves;
	<p>There is no discrimination between the parties and their legal representatives - proxy lawyers on all kinds of proceedings.</p>
c)	non-confidential versions of documents being provided to all except authorised individuals;
	<p>This is an available option, upon request and it`s on the Court`s discretion to order such a measure.</p>
d)	only non-confidential parts of any judgment / decision publicly available?

There is no provision in Law establishing a “confidential judgment”. The abovementioned general rules are the only applicable. However, it could be argued that confidentiality of any judgement/decision should be applied proportionally; namely, as far as confidentiality about trade secrets applies to the hearing/proceedings, it could also be applied to the result of the hearing/proceedings, namely the judgment/decision issued by the Court thereby.

7) If such (or similar) measures are available, do they apply by default, or must the trade secret holder submit sufficient evidence to convince the Court that the information merits protection?

Since no trade secrets protection is provided by the Court *ex officio*, a general rule is applicable, that the trade secret holder must submit sufficient evidence to convince the Court that the information in the particular case merits protection. The exact amount and quality of evidence (documents, witness testimonies, affidavits) depends on the specific procedure held, namely there is a discrimination between TRO, PI and main action proceedings, corresponding to the relevant degree of certainty that is required.

8) Whether or not such measures are available, does the Court restrict the defendant's or claimant's use - after the proceedings have terminated - of the information they gain during the proceedings?

As a general rule, any information that can be characterized as confidential cannot be used in any way, by the parties, after the proceedings have terminated.

Aspect (iii) - Valuation of loss

9) Are damages available as a remedy for trade secret violation?

yes

If so please answer the following sub-questions::

a) how (if at all) is that value diluted by publication?

Despite the absence of any relevant provision of Law and case law, it can be assumed that a trade secret is not diluted by publication, if its owner manages to take immediate and effective judicial actions to prevent such dilution.

b) how are those damages quantified? Specifically, is allowance made for loss of profits; unjust enrichment; and /or what the trade secret holder would or might have charged as a reasonable royalty fee or licence?

For the calculation of damages deriving from violation of trade secret, the general rules of Greek Civil Code are applicable. According to them, a full compensation is available for the trade secret holder, including actual damage and loss of profits caused by the trade secret violation. Said compensation can also be based on the provisions regarding unjust enrichment, since the trade secret violator obtained profits at the expense of their owner and therefore should be ordered to return all the profits as compensation.

c) can damages be awarded for moral prejudice suffered by the trade secret holder? If so, how is moral prejudice defined, and how are such damages quantified?

yes

Please comment:

Pursuant to the general rule of Article 932 of Greek Civil Code, if a violation of trade secrets is considered to be a tort, the Court may award compensation to trade secret owner for moral prejudice suffered by the aforementioned violating actions. The exact amount of such compensation cannot be precisely quantified and it is up to the Court's discretion to award a specific amount of money payable, taking into consideration all the facts of each specific case, namely the economic value of the violated trade secrets, the importance of the latter for their holder's business, the extent of the violation, etc.

d) If so, how is moral prejudice defined and how are such damages quantified?

The exact amount of such compensation cannot be precisely quantified and it is up to the Court's discretion to award a specific amount of money payable, taking into consideration all the facts of each specific case, namely the economic value of the violated trade secrets, the importance of the latter for their holder's business, the extent of the violation, etc.

Aspect (iv) - Proving infringement

10) What elements must be proved to establish violation of a trade secret?

If the defendant is the employee, it has to be shown that the subject matter of the court action falls within the trade secret definition. If the defendant is the new employer of the ex-employee, it has to be additionally shown that the defendant's conduct is a competitive act running contrary to the good morals.

11) What additional elements must be proved (if any) for a trade secret violation in comparison to a breach of confidence, to the extent those are different types of violations?

In cases of a trade secret violation, the key factor is that the criteria set out by the case law definition are applicable. Breach of confidence seems to be a broader notion, in the sense that such a breach may occur even if there is no violation of a trade secret but rather a disruption in the established relationship between the employer and the employee.

12) Can constructive knowledge of a trade secret by an ex-employee or a new employer be imputed, e.g. if the subject-matter of that ex-employee's work was closely linked to the trade secret?

yes

If so, in what circumstances? :

There should be a causal connection between the harm suffered by the violation of the trade secret and the subject matter of the ex-employee's work that is closely linked with that trade secret. This depends on the facts of the case.

13) Does your jurisdiction provide for discovery?

yes

If yes, does it provide for discovery at the pre-action stage; and / or against third parties?:

Discovery is an available remedy even in injunction proceedings but limited (as in main action

proceedings) to the persons named as defendants.

14) Does the burden of proof switch to the defendant if the applicant is able to demonstrate, to a certain level of probability, that there has been a violation?

no

15) Does your law provide for any other methods for securing evidence, such as seizures or ex parte measures?

yes

If so, what requirements must be fulfilled in order for the measure to be ordered and what safeguards are in place to prevent abuse?:

Seizures, as well as ex parte orders, are also available, provided that that a crystal clear violation and great harm on the claimant's side is shown. The defendant may apply for a revocation of such an order and he is entitled to damages, in cases where the claimant's case in main action proceedings fails on the merits and defendant shows that the claimant sought such an order to his knowledge that his right to be protected under that order did not exist or was not violated by the defendant.

16) Where seizure is available, for what purposes can it be used? To secure evidence, to prevent items entering into circulation or for other reasons?

Seizure is available in order to provisionally protect the claimant's rights that could otherwise be seriously harmed, which includes securing evidence and preventing items entering into circulation.

## II. Policy considerations and proposals for improvements of the current law

Aspect (i) - Overlaps with restraint of trade

17) Should limits be placed on the protection of trade secrets to avoid unlawful restraints on trade?

yes

If so, what limits? :

The limits should be inherent to the definition of a trade secret. There must be a balance between the interest of the enterprise, the interests of its employees and the interests of the competitors. It follows that such a definition should be a flexible one, which in turn means the judge should have a certain degree of a discretionary power to apply the definition to the facts of each case.

18) Should different obligations of confidence / non-use apply to different employees? Why/why not?

Different obligations of confidence to different employees should not be dealt as a threshold to strictly define the right per se but rather as a refutable presumption that the right was violated.

Aspect (ii) - Ensuring confidentiality during Court proceedings

19) Should a defendant, who is sued unsuccessfully for a trade secret violation, and who learns of the trade secret during the course of the litigation, be required to not use the trade secret after the proceedings? Why/why not?

There should be no obligation for the defendant to not use the trade secret disclosed, unless an obligation for confidentiality was imposed in the course of the judicial proceedings by the Court, which should be an order that may be granted following a request from the claimant's side.

20) Should such obligations of confidentiality attach to information that the defendant developed independently prior to the trade secret proceedings, or develops independently after the trade secret proceedings? Why/why not?

Information developed independently by the defendant should unexceptionally be dealt with caution, in the sense that they *prima facie* do not (or should not) fall within the scope of the trade secret protection, unless there is a strong causal connection with the trade secret.

Aspect (iii) - Valuation of loss

21) Should damages as a remedy be available by default, or only where injunctive relief is (a) not possible, (b) adequate, or (c) not necessary? If by default, why?

yes

If yes please answer the following sub-questions::

a) only where injunctive relief is not possible?

no

If not please comment.:

b) only where injunctive relief is not adequate

no

If not please comment.:

c) only where injunctive relief is not necessary?

no

If not please comment.:

d) If by default, why?

In our view, damages should be available by default, serving both as a "punitive" measure for the trade secrets` violator and for reasons of a full and adequate relief of their holder`s loss. This should be independent of the existence and success of an injunctive relief for the same subject - matter.

Aspect (iv) - Proving infringement

22) Should constructive knowledge of a trade secret by an ex-employee be imputed to their new employer?

yes

If yes, in what circumstances? :

Only if there is a causal connection between the harm suffered by the ex-employer and the new employer`s conduct.

23) Availability of pre-action evidence orders and seizure orders.

a) Should pre-action evidence preservation orders be available?

yes

If so, should the hearings to decide whether or not to grant them be able to take place ex parte?:

In our view, both questions must be answered positively. It is obvious that both pre-action evidence preservation orders and seizure orders aim to prevail further violation of the trade secrets. On the other hand, ex parte order is available only if the violation is crystal clear and the harm suffered difficult to reverse.

b) Should pre-action evidence seizure orders be available?

yes

If so, should the hearings to decide whether or not to grant them be able to take place ex parte?:

In our view, both questions must be answered positively. It is obvious that both pre-action evidence preservation orders and seizure orders aim to prevail further violation of the trade secrets. On the other hand, ex parte order is available only if the violation is crystal clear and the harm suffered difficult to reverse.

24) What if the claimant learns of new trade secrets (of the defendant) during the course of a seizure?

The claimant may be ordered not to use the new trade secrets upon the defendant`s request.

### III. Proposals for harmonisation

25) Is harmonisation in this area desirable?

Yes.

If yes, please respond to the following questions without regard to your national or regional laws. Even if no, please address the following questions to the extent you consider your national or regional laws could be improved.

Aspect (i) - Overlaps with restraint of trade

26) Please propose principles for the circumstances in which trade secret enforcement actions should fail, because such actions would be de facto restraints of trade.

There should be no circumstances under which actions would be dealt as *de facto* restraints of trade.

27) What relief should courts give when a trade secret violation has occurred or is about to occur, but an enforcement action is barred as a restraint of trade?

The claimant should always have the right to challenge such a bar before the competent courts, which includes the right to seek an injunction under which such a bar is provisionally waived.

28) Should employees subject to a stricter obligation of confidentiality be released from that duty in certain circumstances? If so, in what circumstances?



In cases where the employee may show that his employer has unclean hands.

Aspect (ii) - Ensuring confidentiality during Court proceedings

29) What protection for trade secrets should be available during Court proceedings, and what conditions should be satisfied for that protection to be given?

It should be on the Court's discretion to decide the extent of the protection on the facts on the case.

30) If an enforcement action fails (e.g. because the defendant had independently developed the secret information and did not misappropriate it), what type(s) of confidentiality or non-use obligation, if any, should continue or cease to apply?

A post trial obligation in this regard should be available but it should also be dependent on the reasons the enforcement action failed.

Aspect (iii) - Valuation of loss

31) Please propose the principles for quantifying damages for trade secret violations.

There are two principles: a) degree of culpability and b) type of trade secret concerned.

32) Should courts award moral damages?

yes

If so, how should they be quantified?:

It's on the Court's discretion to quantify moral damages, taking into account all relevant factors.

Aspect (iv) - Proving infringement

33) What measures to secure or preserve evidence should be available?

There is no need for further measures to be provided in this regard.

34) What restrictions should apply to the use of seized evidence by the claimant?

The use of seized evidence may only serve the need for which seizure was granted. Any restrictions that may protect the defendant's various interests and rights should be available, if sought.

Summary

Trade secrets in Greece are not considered to be an IP right, but rather a legal interest to be protected. Moreover, there is no statutory definition of "trade secrets" but rather a definition dependent on case law, which is flexible and strikes a balance between the interests of an enterprise and free trade. Accordingly, protection of trade secrets in Greece is case specific. Judicial remedies are available but

are dependent on the Court's discretion.

Harmonization in this area is desirable in order to enhance a balance between confidentiality and free trade, which are principles commonly accepted.

Please comment on any additional issues concerning trade secrets you consider relevant to this Working Question.

Not applicable.

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