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## Q247

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

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## 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.:
	<p>At the beginning, it would be appropriate to make a reservation concerning understanding of the concept 'trade secret' upon which this report is drafted. Similarly like most EU Member States, Latvian law does not envisage the legal definition of the term 'trade secret' ('komerccnoslāpums' in Latvian). Instead Latvian law provides what kind of information may be considered as trade secret leaving its consideration to right holders themselves and assessment of courts in case if protection of trade secrets is sought. As regards merchants, such consideration rule is provided by Article 19 (1) of the Commercial Law which envisages that a merchant may attribute the status of trade secret to certain kind of information which satisfies criteria laid down in that provision. Likewise, Article 83 (1) of the Employment Law provides that employers are obliged to indicate in writing what kind of information is considered as trade secret. In relationships between physical and legal persons, from one side, and state and municipal authorities, from other side, trade secrets are covered by the term 'information of restricted access'. The status of information of restricted access is requested during administrative procedure and granted (or rejected to grant) by state or municipal institutions (Articles 5 (2) (3) and 7 of the Information Disclosure Law).</p>

Another reservation relates to the scope of this report which covers only Latvian national law without discussion of relevant EU law (for instance, in the case of block exemption regulations in relation to trade secrets).

a) If so, under what circumstances and under which legal regimes (e.g. competition law)?

Though Latvian law provides protection of trade secrets (through law of delicts (torts) included in the Part of Law of Obligations in the Civil Law of the Republic of Latvia, sui generis regulation in Article 19 of the Commercial Law, and unfair competition law) at the same time it envisages limitations of that protection. These limitations for protection of trade secrets are mainly ensured through competition law, commercial law, and employment law to be discussed below in more detail.

In competition law, limitations of protection of trade secrets are provided through regulation of prohibited agreements or abuse of dominant position. In the case of horizontal agreements, a block exemption applies on the basis of protection of know how (point 2.3. of the Cabinet Regulations No. 798 adopted on 29 September 2008 'Regulations Regarding Non-subjection of Separate Horizontal Co-operation Agreements to the Agreement Prohibition Specified in Section 11, Paragraph One of the Competition Law').

As regards employment law, an employee is obliged to ensure non-disclosure of trade secrets (Article 83 (1) of the Employment Law), and this duty operates both during employment relationships as well as after their termination. Likewise, the Employment Law provides that an employee may be restrained from employment relationships with new employers carrying out activity similar to activity of an ex-employer after termination of employment relationships. Such a limitation is possible only on the basis of a mutually concluded agreement between an employer and an employee (subject to statutory limitations as provided by Articles 84-85 of the Employment Law).

Though Latvian commercial law also protects trade secrets either during regulation of activities of certain persons or in the case of specific contracts, yet it also imposes limitations of that protection. So, the Commercial Law requires that members of a board of a capital company (i.e. either a limited liability company or a joint stock company) are prohibited to operate with another merchant carrying out a commercial activity which is similar to an activity of that company (Article 171 of the Commercial Law). This duty exists irrespective of a legal relationship between a member of the board and a respective company (an authorisation contract, an employment contract, or other contract). Similar duties exist in personal partnerships (Articles 82 and 122 of the Commercial Law). Likewise, similar limitation may be imposed in the case of specific contracts like relationships between commercial agents and principals (Article 61 of the Commercial Law) or between a franchisor and a franchisee (Articles 479-480 of the Commercial Law).

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?

Knowledge gained by an employee during employment relationships may be divided into objective knowledge which contains knowledge about trade secrets and subjective knowledge which consists of special knowledge concerning, for instance, a particular process or activity which is based on

experience of that employee. Though Latvian law is not clear on this point, yet such division is admitted in practice by Latvian courts when reviewing disputes concerning employment relationships. If the first type of knowledge is protected through duty of non-disclosure of trade secrets on the basis of Article 83 (1) of the Employment Law discussed above then the latter - on the basis of an agreement restricting employment relationships (also discussed above).

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

Employees are under a duty of non-disclosure of information containing trade secrets on the basis of law (Article 83 (1) of the Employment Law) irrespective of the wording of an employment contract. Yet, as indicated above, an employer must inform in writing what kind of information shall be perceived as trade secrets (Article 83 (1) of the Employment Law). The Employment Law does not provide how such information 'in writing' takes place but usually it is ensured in practice by adopting an internal document by the employer where it is specified respective information which is considered as trade secret.

Express confidentiality clauses included in employment contracts would just repeat a statutory provision, i.e. a duty included in Article 83 (1) of the Employment Law and would be without influence on the statutory term for observing such a duty, i.e. all the time during employment relationships and after their termination.

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?

An ex-employee's duty of non-disclosure lasts all the time after termination of employment legal relationship.

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?:  
Employees may use subjective knowledge in a new employment place but not objective knowledge (for the distinction of these two kinds of knowledge, see the answer to Question 2 above).

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 Employment Law does not provide any differentiation for duty to ensure non-disclosure of trade secrets and therefore applies equally in respect of all employees. Yet, as regards competition limitations

after termination of employment relationships this Law provides that the character of these limitations should be differentiated depending on a particular employment relationship. It may be considered that in this case ex-employees that are involved in management of a merchant (members of a board or a council, persons having a procura, or having other managing position) may be subject to stricter limitations within these competition limitations after termination of employment relationships yet involving higher remuneration for observation of that limitation (criteria for imposing competition limitations after expiry of employment relationships are set out in Article 84 of the Employment Law).

Aspect (ii) - Ensuring confidentiality during Court proceedings

6) What measures or provisions are available to preserve the secrecy of trade secrets during Court proceedings?

Latvian procedural law provides possibility for restriction of rights of parties to access information containing trade secrets yet in a different extent depending on a particular procedure (civil, administrative, or criminal). Yet, such possibility is subject to discretion of a court in all three procedures.

In civil procedure, Article 11 (3) (1) of the Civil Procedure Law envisages that according to a reasoned request by a participant in the matter or at the discretion of the court the court session or its part may be declared as closed if it is necessary to protect trade secrets. Yet, neither this nor any other provision restricts access to court case materials in relation to participants of a civil court case in question. Another provision is found concerning provision of information in intellectual property infringement cases (they are subject to a specific procedural regime provided by Chapter 32.2 of the Civil Procedure Law). So, Art 250.16 (1) of that Law envisages that in matters of the infringement of intellectual property rights, a court on the basis of a reasoned request from the plaintiff, taking into account the rights of participants to the matter to protection of commercial secrets, may request that the information regarding the origin of the goods or services and the distribution thereof be provided by the defendant or a person.

As regards administrative procedure law, Article 145 (4) of the Administrative Procedure Law provides that access to court case materials may be restricted during court proceedings as well as after accomplishment of court proceedings (either on a court's activity ex officio or on the basis of a reasoned request by a case participant).

Similarly as in the case of civil procedure, in criminal proceedings a court may determine a closed court session on the basis of a reasoned decision in order to protect a trade secret (Article 450 (3) (4) of the Criminal Procedure Law). However, also the Criminal Procedure Law does not restrict access to court case materials in relation to participants of a civil court case in question.

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;

b) disclosure of evidence only to the legal representatives of the opponent, but not to the opponent themselves;

c) non-confidential versions of documents being provided to all except authorised individuals;

d) only non-confidential parts of any judgment / decision publicly available?

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?

Latvian courts do have a right to apply ex officio measures for protection of trade secrets or to decide on application of such measures based on an initiative of a party. Such dual possibility directly arises from legal provisions mentioned in the answer to the previous question.

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?

Latvian procedural law does not restrict use of information or documents containing trade secrets obtained during court proceedings by participants of a court case in question. This situation is different from disclosure of information containing state secrets (though this situation undoubtedly does not apply in relation to trade secrets) in Latvian administrative procedural law as Article 108.1 (4) of the Administrative Procedure Law obliges a court to warn case participants about a duty to keep state secret and liability for disclosure of the state secret. Such warnings may be considered as appropriate also in the case of trade secrets, especially in the case of proceedings for protection of trade secrets involving such trade secrets which have not lost their status due to a violation.

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?

If trade secret is disclosed to the public by means of publication, its value is completely lost and, consequently, a right holder may apply for damages as provided by Latvian law.

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?

Availability of damages is regulated under the Part of Law of Obligations in the Civil Law of the Republic of Latvia which provides that compensation of damages is available for any violation of private rights (Articles 1635 and 1779 of that Law). Consequently, compensation of damages arising from violations of trade secrets is open for a right holder of trade secrets in question. The type of damages depends on a claimant but it could be loss of profits, unjust enrichment, or full value (value of investments) of trade secret in question.

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:

Though non-pecuniary damage may be compensated on the basis of Article 1635 (1) of the Civil Law yet Latvian courts would be reluctant to provide such a compensation for a legal entity.

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

See the answer to the previous question.

Aspect (iv) - Proving infringement

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

The Latvian law does not provide *expressis verbis* requirements to be proved for a claim seeking to establish a violation of a trade secret would be satisfied. Yet, as it arises from Latvian court practice, it should be proved the fact of existence of a trade secret, its illegal use in a commercial activity of a defendant, and harm made to a plaintiff (a right holder of a particular trade secret). In the case of collection of damages in any of forms mentioned in the answer to the previous question, there should be proved fault, the amount of damages, and causation between the amount of damages and an illegal activity in question.

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?

There would be no additional elements to be proved.

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? :

Though this aspect is not explicitly regulated by Latvian law, it could be assumed that Latvian courts may think that protection is afforded to trade secrets once they come to existence but not to constructive knowledge as such.

13) Does your jurisdiction provide for discovery?

no

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?:

Latvian civil procedure law is familiar with procedure of securing evidence both before and after initiating court proceedings. Articles 98 - 103.2 of the Civil Procedure Law provides the regulation for the procedure for securing evidence in relation to all kinds of claims including claims for violations of trade secrets.

The legal basis for securing evidence is the case if a claimant or a possible claimant has cause to believe that the submission of necessary evidence on his or her behalf may later be impossible or problematic (Article 98 (1) of the Civil Procedure Law). In order to secure evidence if such cause exists, a claimant (or a possible claimant) shall submit an application to a court by indicating the facts for the proving of which this evidence is necessary and the reasons why the applicant is requesting the securing of evidence (Article 99 of that Law). By reviewing this application, a judge or a court adopts a decision within 10 days except the emergency case when evidence may be secured without summoning potential participants in the matter, i.e. ex partes (Article 100 (3) of that Law). However, in this case a defendant shall be notified about the decision on securing evidence not later than by the moment of the execution of the decision in question. Another safeguard relates to compensation of damages sustained by a defendant in relation to securing of evidence if a claim is either not brought at all (in the case of securing evidence before bringing a claim) or it is dismissed.

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?

Latvian civil procedure law provides seizure either during the procedure for securing evidence in relation to evidence or during the procedure for security of a claim in relation to objects which shall be destroyed if a claim is satisfied. In the first case, the purpose is to secure evidence if there is cause to consider that evidence may be destroyed but in the second case – cause to consider that a court judgment may not be fulfilled, for instance, illegal products could not be destroyed as they would be either sold or moved.

**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? :

Protection of trade secrets should be subject to limitations to avoid abuse of procedures intended to ensure that protection and therefore precluding hindering commercial activity in general. The existing Latvian law addresses these issues in an adequate manner.

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

Yes, obligations of confidence, i.e. non-disclosure of trade secrets of an employer, should be differentiated in relation to different employees depending on their position and character of their work. If an employee is involved in management of a merchant or a specific activity of that merchant, the duty for non-disclosure should be stricter both during and after employment relationships. However, in the case of ordinary employees whose work is not subject to specific knowledge or do not having access to specific information should be subject to lower obligation of non-disclosure. As it was mentioned above, the currently effective Latvian law does not provide such differentiation except the case of

competition limitations after termination of employment relationships which is subject to an individual assessment of each employee.

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?

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Yes, a defendant in such circumstances shall be restrained from the use of trade secret which he or she learned during court proceedings in order to continue ensuring protection of trade secret in question. This objective could be achieved through adoption of a separate provision requiring case participants to abstain from disclosure of information containing trade secrets they learned during court proceedings in conjuncture with their warning by a court about non-disclosure of trade secrets and liability for breach of this duty.

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?

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No, duty of non-disclosure should not be applied in relation to such information just because of the fact that particular information is developed independently by putting efforts and resources for acquiring a particular 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?

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

a) only where injunctive relief is not possible?

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no  
If not please comment.:

As stated below (the answer to question 21 d)), compensation of damages should be available in any situation for trade secret violations and not depending on availability or unavailability of certain types of damages.

b) only where injunctive relief is not adequate

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no  
If not please comment.:

As stated below (the answer to question 21 d)), compensation of damages should be available in any situation for trade secret violations and not depending on availability or unavailability of certain types of damages.

c) only where injunctive relief is not necessary?



no

If not please comment.:

As stated below (the answer to question 21 d)), compensation of damages should be available in any situation for trade secret violations and not depending on availability or unavailability of certain types of damages.

d) If by default, why?

Compensation of damages should be available in any situation when a trade secret violation is established, i.e. by default. Likewise, it would be advisable to introduce a presumption of existence of damages in the situation if a violation of trade secret is established and minimum amount of damages to be collected in any case if such a violation takes place (except if it is completely inappropriate considering circumstances of the case).

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? :

The use of objective knowledge containing trade secret by an ex-employee should be imputed to a new employer because in its favour and interests such use takes place.

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?:

Yes, ex parte procedures for securing evidence before initiating court proceedings should be available to ensure efficient and emergent securing of evidence if circumstances of a case dictate such a procedure. At the same time, safeguards for a defendant shall be available including possibility for appeal of these measures and a particular sum of damages in the case if such measures are found to be abusive or later cancelled due to fault of a possible claimant.

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?:

See the answer to the previous question.

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

In this situation, the claimant is under the duty of non-disclosure of these trade secrets and subject to court proceedings of trade secret violation if he or she acts otherwise.

### III. Proposals for harmonisation

25)	Is harmonisation in this area desirable?
<p>Yes, harmonisation in the area of protection of trade secrets is necessary to ensure unified understanding and protection standards of trade secrets at the international arena. This harmonisation is especially necessary for EU Member States considering the necessity to ensure the smooth functioning of the internal market. In this regard, a draft directive on the protection of trade secrets drafted by the European Commission may be supported yet this directive should be improved from the point of view of precise formulations and protection rules.</p>	

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.
<p>Claims for protection of trade secrets should be limited if they are liable for distortion of competition by promoting unreasonable restraints through prohibited agreements or unreasonably limits mobility of employees in such a way distorting competition and commercial activity. The distortion of competition should take place in cases when a violation alleged goes beyond the objectives of protection of trade secrets.</p>	

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?
<p>In this case, a court shall abstain from relief.</p>	

28)	Should employees subject to a stricter obligation of confidentiality be released from that duty in certain circumstances? If so, in what circumstances?
<p>Yes, such employees should be released from that duty if a court finds that particular information does not contain trade secret, such obligation unreasonably limits mobility of employees if there is material change of circumstances either on part of ex-employer or an employee, or is contrary to the objectives of a particular commercial activity of ex-employer.</p>	

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?
<p>Protection of trade secrets during and after court proceedings should take place either through prohibition imposed on another party to access relevant documents of a court case or to bear liability for their disclosure.</p>	

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

No obligation should be imposed upon a defendant in such circumstances.

Aspect (iii) - Valuation of loss

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

As noted above, in the case of trade secret violations there could be imposed minimum amount of damages if a violation itself or value of trade secret is insignificant. In other cases, the amount of damages shall correspond to investments put into development of a particular trade secret as a general form for quantifying damages.

32) Should courts award moral damages?

yes

If so, how should they be quantified?:

If a right holder of particular trade secret would receive compensation for pecuniary damage, compensation for non-pecuniary damage in trade secret violation cases could be considered onerous and unreasonable depending on a case.

Aspect (iv) - Proving infringement

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

As regards Latvia, the currently effective regulation for securing evidence described above should be considered as appropriate.

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

If evidence is seized during the procedure for securing evidence, the use of that evidence shall be prohibited in respect of any participant of court proceedings and may be exploited only in relation to on-going court proceedings.

Summary

The Latvian law provides protection of trade secrets through different branches of law by imposing limitations of that protection through Competition Law, Employment Law and Commercial Law. At the same time, the Latvian law does not provide any specific legal regime for calculation of damages in relation to violations of trade secrets. Likewise, the Latvian Civil Procedure Law provides for the procedure for securing evidence yet it does not envisage protection for trade secrets which are disclosed during court proceedings. Therefore, if court proceedings are initiated for protection of trade secrets, it would be difficult to consider afterwards that this trade secret may be viewed as such as a result of court proceedings where case participants learn about this trade secret.

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