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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)?
no
If not please comment.:

In general trade secrets protection is not regarded as a restraint of trade under Norwegian law and the concept of protection of trade secrets has rather emerged from the notion of unfair competition. However, one cannot rule out that some agreements or actions to a certain extent may be considered as a restraint of trade.

Pursuant to Section 38 of the Norwegian Act relating to conclusion of agreements an agreement whereby an person, or more typically an employee, undertakes not to compete or to be employed by a competitor, will only be considered binding in so far as the undertaking is considered to be reasonable taking into account the relevant circumstances.

Norway also has antitrust regulations similar to article 81 and 82 of TFEU and block exemptions on *inter alia* technology transfer agreements that are applicable to trade secret licences. In principle one cannot rule out that e.g. refusal to enter into a license agreement may amount to abuse of dominant position under the applicable competition legislation. Case law from the ECJ with respect to TFEU article 82 will be relevant for the interpretation of the Norwegian competition legislation.

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

Norwegian law does not contain any formal demarcation criteria between general skills/knowledge acquired during the course of employment, confidential information, and trade secrets.

However, there seems to be general consensus that a piece of information has to meet the following three requirements in order to be regarded as a *trade secret*:

(i) The information has to be “specific” to an enterprise.

(ii) It has to have an economic value.

(iii) The enterprise must have taken some precautions to preserve the secrecy of the information.

The requirement that the information must be “specific” to a business implies that the information cannot be “*generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question*”, cf. article 39 2 a) of the TRIPS agreement. It also implies that information that is very “abstract” or “general”, just a “mere goal, purpose or possibility” will not be subject to protection. Furthermore, the information must be possible to describe.

Trade secrets are subject to a number of protections under Norwegian law. Norwegian law prohibits acquisition of a trade secret from another in “an unfair manner”, and all sorts of use that a person, who has obtained the trade secrets from somebody else in confidence or by unlawful means, makes of the trade secret. It is also forbidden for such persons to disclose the trade secrets to others with a purpose of making them able to exploit the secret.

Mere “subjective skills”, general skills/knowledge, that are typically acquired by an employee while he carries out a certain job, which another person cannot learn otherwise than by doing the same kind of work, will not be regarded as trade secrets under Norwegian law.

The term “confidential information” is not a defined term under Norwegian law. However, it is rather common in agreements to define what kind of information that constitutes confidential information under the said agreement. Such definitions may be limited to cover merely specific information, but it is very common that a definition of confidential information covers more information than trade secrets protected under the applicable legislation.

In a case where the only violation invoked by the information’s “owner”, is a violation of a contractual principle of loyalty or confidence, protection may be granted even if the information does not meet the relatively low minimum requirements for “real” trade secret protection. However, the use of information acquired from a former employer or business partner would, if the information does not meet the requirements for being a “real trade secret”, probably only be considered as a violation in a very limited number of situations, typically if the “use” in question is a slavish imitation of the information owners’ own products or production methods

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

All employees are under a duty of confidence regardless of whether such obligation is set out in the employee's employment contract. The duty would prevent the employee from using trade secrets to his own benefit while still employed, and to reveal it to others if this could harm the interests of the employer.

Express confidentiality clauses to protect classes of information broader than would anyway be protected by the employee's duty of confidence, are permitted *as such*, and it is rather common to provide for more detailed and specific rules on how confidential information shall be protected in the said relationship than what can be derived from the quite generally formulated provisions of the statutory law. One can, at least in some instances, define the information to be protected, one can agree on specific measures the parties shall undertake to preserve the secrecy of information (for example rules on how the information shall be stored, and provisions exhaustively listing the people who shall have access to the information, rules obliging the recipient to return all materials containing the confidential information once the contractual relationship is over). The protection can be strengthened by supplementary provisions for example forbidding the receiving party to reverse engineer received equipment, and non-compete obligations.

Generally speaking, however, it may be difficult to obtain a much broader protection of confidential information by a non-disclosure/non-use agreement than the protection that is provided by the statutes. Courts will tend to interpret at least a generally formulated agreement in such a way that it will give about the same protection of information as the protection provided by the Norwegian Penal Code and the Norwegian Market Control Act.

In principle an employer cannot unilaterally impose obligations of non-disclosure on an employee leaving the company that are more severe than the obligations following from the statutes that have already been discussed. But it can be useful to remind the employee of these obligations when he leaves. Such a reminder will, among other things, demonstrate that the employer takes steps to preserve the information's secrecy and this is a prerequisite for protection under the statutes.

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?

In the absence of any express confidentiality clause, the duty of confidence in relation to trade secrets last would in principle be perpetual. However, the duty of confidence will of course only apply as long as the information remains a trade secret, i.e. if the information later becomes publicly available or loses its economic value the duty of confidence will not apply. Furthermore, in order to strike a fair balance between the right holder and the employee courts will probably not extend the duty of confidence in relation to trade secrets any longer than absolutely necessary to protect the right holder's reasonable commercial interests.

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?:

Unless an employee is subject to an enforceable non-compete agreement, the employee may use knowledge acquired in the course of earlier employment in its new employment. The employee may however not use trade secrets that the employee had access to in the course of its earlier employment, see the answer to question 2 above concerning the differences between trade secrets and more general knowledge.

5)	Are certain employees subject to a higher obligation of confidentiality / non-use?
	<p>yes</p> <p>If so, which employees, and what is the rationale for any distinction between employees?:</p> <p>There are no statutory provisions designating certain employees with a higher obligation of confidentiality / non use. However, one cannot rule out that there might be differences with respect to how the applicable statutory provisions are applied in practice, i.e. it may seem reasonable to impose a higher obligation on e.g. an employee having been research director than on an employee having had a subordinate position.</p>

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>Under Norwegian law hearings are open to the public, and proceedings and judicial decisions may be reported publicly, unless otherwise decided by law or by the court pursuant to the law, see further below.</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>A party or a witness may refuse to provide access to evidence that cannot be made available without revealing trade secrets. That means that a party is not obliged to produce a document disclosing a trade secret unless the trade secret is "black lined", nor is the party or a witness obliged to give a testimony that will disclose such a secret.</p> <p>The court may nevertheless order such evidence to be made available if, after balancing the relevant interests, the court finds it necessary. Such order may only be given in relation to evidence that are important for the court's ability to reach a correct decision in the case.</p> <p>If a party voluntarily presents evidence containing trade secrets, the court shall impose a duty of confidentiality on the persons present unless the party presenting the evidence states otherwise. If the court has imposed a duty of confidentiality, oral hearing of the evidence shall be held in camera, i.e. with only the parties and their counsel present.</p> <p>If the court orders a party to disclose evidence containing trade secrets, the court may impose a duty of confidentiality and decide that oral hearing of the evidence shall be held in camera, i.e. with only the parties and their counsel present.</p> <p>In cases that are not heard entirely in writing, the general public is entitled to have access to inter alia any written evidence (documents etc.) that is invoked during the oral hearing. However, the court shall refuse access to evidence that the parties can require is presented in camera relating to trade secrets.</p>
b)	disclosure of evidence only to the legal representatives of the opponent, but not to the opponent themselves;
	<p>Under Norwegian law it is not possible for a party having been ordered to disclose evidence</p>

containing trade secrets to limit the disclosure to the opposite party's legal counsel but not the opposite party.

A party putting forward a claim against another must naturally produce some evidence to substantiate the claim. This can be problematic if the evidence is a trade secret that the claimant wants to keep secret. A possibility is then to ask for the case to be heard in camera, cf., above.

However, some trade secret owners find it too risky to reveal their most important secrets to the other party, who is normally a competitor, even if the court imposes a duty of confidentiality on the party. If the claim cannot be substantiated in any other way than by producing the evidence, the case will fail. In some cases, however, it is possible to find a way out of the problem. For example, if the defendant is accused of having copied the claimant's software, the parties can submit the source code of their software to an independent expert instead of giving it to the other party, and let him assess whether the claimant's source code has been copied by the defendant.

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

As mentioned above under the reply to question 6 a) a party (or a witness) may refuse to provide access to evidence that cannot be made available without revealing trade secrets. Thus, although there are no specific rules prescribing that a party may disclose non-confidential documents to all expect authorised individuals the party may of course try to limit the disclosure of trade secret is such a way. However, if the party disclosing the evidence will invoke this before the court it may be difficult to limit the disclosure in such a manner, as the principles of fair trial and equality of arms would require that the opposite party gets access to the evidence in order to present its defence.

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

The public is entitled to access court records, records of judicial mediation and judicial rulings. Thus, as a starting point a judgment/decision where e.g. the trade secrets are described will be available to anybody requesting access to the decision/judgement. However, if the court has imposed a duty of confidentiality, see the answer to question 6 a) above, the public will only be entitled to access the conclusion and not the premises. However, in practice this is often solved by the trade secret holder agreeing to make available the parts of the judgement/decision that will not reveal the trade secrets.

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?

The measures above do not apply by default, i.e. the trade secret holder must invoke the protection. The court must make its own assessment as to whether the protective measures will apply, e.g. whether the information in question qualifies as a trade secret. However, it is normally sufficient for a party to argue why a specific type/nature of information shall be considered as trade secrets, emphasising why disclosure would be to the detriment of the party's business.

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 mentioned in the reply to question 6 a) above, the Court may to a large extent impose a duty of confidentiality on the persons being present when the trade secret is disclosed. Violation of the confidentiality obligations is subject to fines.

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?
	<p>As noted in the answer to question 2 above one of the conditions for a piece of information to be considered as a trade secret, and thus being protected under the applicable legislation, is that information is in fact secret, i.e. unknown to or not accessible to the general public.</p> <p>If the trade secret is published or otherwise made known, whether by the trade secret holder or as a result of a trade secret violation, the damage is to a certain extent irreversible in the sense that the trade secret is no longer considered a trade secret and thus the value is diluted. However, the trade secret holder may of course be entitled to damages because of the values that has been diluted/lost.</p>

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?
	<p>Pursuant to Section 48 a of the Norwegian Marketing Control Act the infringer will be liable to pay either</p> <ul style="list-style-type: none">(i) a reasonable license fee and damages that would not have been suffered in case of licensing, e.g. disbursements to detect the infringement and interruption of the market through creation of bad-will(ii) damages incurred as a consequence of the infringement or(iii) surrender of the infringers gain from the infringement. <p>It is explicitly stated that the compensation shall be stipulated on the basis of the method in (i) to (iii) that is most advantageous for the victim of the infringement.</p>

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?
	no
	If not please comment.:
	Under Norwegian law there is no basis for awarding damages for moral prejudices or for punitive damages.

d)	If so, how is moral prejudice defined and how are such damages quantified?
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Aspect (iv) - Proving infringement

10)	What elements must be proved to establish violation of a trade secret?
	In order to prove violation of a trade secret, the claimant must prove that (i) that the information can be deemed as a trade secret and (ii) that the defendant's acts are "unfair" or "unwarranted", i.e. that the

trade secrets was acquired or exploited in an unlawful manner and that using/revealing the trade secrets cannot be considered as legitimate (e.g. because they were made available to prevent a crime or made available to reveal serious wrong doings by the trade secret holder.)

The further element that must be proved will depend on the type of violation. In short one might say that there are two different categories of cases. First, there are cases where the claimant must prove that the acquisition of the trade secret was unlawful. Second, there are cases where the defendant's had lawful access to the trade secret, e.g. as part of being employment by the trade secret holder, and where the claimant must prove that the defendant either disclosed the information to a third party or unwarranted used the trade secret himself.

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?

As explained above in the answer to question 2, Norwegian law does not provide any formal definition of a trade secret and does not as such distinguish between a trade secret and confidential information.

However, as noted in the answer to question 2 a trade secret must consist of confidential information of commercial value, i.e. information related to the trade of the business and that has an economic value because it is secret. Thus, an additional element which needs to be proved in connection with a trade secret violation compared to case regarding breach of confidence is that the information does in fact fulfil the "criteria" for trade secrets.

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? :

Under Norwegian law the court shall establish the facts upon which the case shall be determined based on a free evaluation of evidence. A concept of "constructive knowledge" does not exist as such under Norwegian law, but one cannot rule out that the courts, within the legal framework concerning the rules of evidence, will apply certain presumptions, e.g. in case where the facts of the case cannot otherwise be reasonably explained than by a trade secret violation.

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?:

Norwegian law does not provide for discovery in the sense that the concept is known from common law countries. However, all persons are obliged to make available as evidence objects, including documents, that are in their possession or of which they can obtain possession. In order to fulfil this obligation the court may order the parties and other persons to answer questions about whether they are aware of items of evidence and to make necessary investigations in such respect. They may also be ordered to prepare comparisons, extracts or other reviews of information that may be gathered from items of evidence.

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?

yes

If yes, what is this threshold?:

If the applicant is able to demonstrate that it is more likely than not that a violation has taken place, i.e. the applicant is able to lift his burden of proof, one might at least in theory say that the burden of proof switches to the defendant. In theory one might also say that the burden of proof in a case will switch back and forth between the applicant and the defendant depending on the evidences presented. However, such models seem to be rather theoretical, and the court shall in any way establish the facts upon which the case shall be determined based on a free evaluation of evidence.

According to general principles applicable to civil law cases the threshold will be the balance of probabilities, i.e. it must be more likely (more than 50 %) that a violation has taken place than not. However, one cannot rule of that the court will apply a somewhat higher threshold if the ruling would imply that the court will find that the defendant has committed a serious offence, e.g. that the trade secret has been acquired by the defendant having committed burglary.

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?:

Pursuant to Norwegian law evidence may to a certain extent be secured outside a lawsuit by judicial examination of parties and witnesses and by providing access to and inspecting real evidence.

Pursuant to Section 28-2 of the Civil Procedure Act, one can request a court to secure evidence before a lawsuit is initiated, if the following conditions are fulfilled:

- a) the evidence must be of such character that it can be of importance in a legal dispute;
- b) there must be a clear risk that the evidence will otherwise be lost or considerably impaired if not secured, or it must because of other reasons be "particularly important to get hold of the evidence before a court case is initiated".

As a main rule, the other party shall be heard before the court makes a decision on such securing of evidence. However, the court can issue an order on securing of evidence, without prior notice to the other party, i.e. *ex parte*, if the court finds that the conditions above are fulfilled, and there is

- c) reason to fear that notice to the other party could obstruct the securing of evidence (Section 28-3 fourth paragraph).

A petition to secure evidence shall be submitted to the court before which a lawsuit could have been brought.

If the conditions for securing evidence are met, evidence may be secured through examination of parties and witnesses and by providing access to and inspecting physical objects (such as documents). Usually an enforcement officer will visit the other party and secure the evidence shortly after the decision. If the securing requires expertise, e.g. in the event of copying of hard disks, an expert to assist the enforcement officer is often obtained. In some instances, the requesting party's counsel, or a technical consultant engaged by the counsel, is allowed to be present during the securing of evidence.

As a starting point, all types of documents may be secured, including accounts, contracts, memos and electronically stored information. The claimant must specify which evidence it wishes to secure, but the courts has so far not set this requirement particularly strict at the stage of securing evidence.

As a main rule, the claimant is not granted access to the evidence before the decision to secure

evidence is final and binding. The other party will be given two weeks to request an oral hearing in order to establish whether the decision to secure evidence shall be upheld. The decision may also be appealed to the Appeal Court, and in principle also to the Supreme Court.

When (and if) the decision is upheld and becomes final and binding, it must be decided how the claimant shall be given access to the evidence. The effectuation of a decision to grant access is to a large extent a practical exercise, where the procedure will vary from case to case, depending on the circumstances. If the securing of evidence comprises a large number of documents, it may be decided that an expert shall be appointed to go through the material in order to identify evidence that is relevant. The expert could draft a report, which thereafter forms the basis of concrete requests from the requesting party for access to individual documents. At this stage the requirements for specification from the requesting party, of what it actually wants to see, is stricter than the specification requirement for what evidence that shall simply be secured. However, it varies from case to case how strict the specification requirement will be. It depends inter alia on the likelihood for an infringement having taken place, and how specific it seems possible to be without risking not to “catch” important evidence.

Also privileged material containing trade secrets may be seized or copied during the securing of evidence, but as a main rule the requesting party shall not be granted access to such information. The court may, however, decide that trade secrets such as the defendants own technical drawings, shall be disclosed subject to a duty of confidentiality, if this is important for the clarification of the case.

Pursuant to Section 28-5 first paragraph of the Civil Proceedings Act, the requesting party shall pay the costs for the securing of evidence, also if the request is successful. This includes the costs for the other party’s legal counsel, if it was reasonable for the other party to engage a counsel for securing its interests. However, the other party may be ordered to cover the legal costs related to the request if they are either to blame for the need for securing of evidence or has fought the request for securing evidence without reasonable cause, cf. Section 28-5 second paragraph of the Civil Proceedings Act.

The court may also decide that the party requesting securing of evidence shall pay or provide security for potential compensation to the other party.

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 to secure evidence and not in order to prevent items entering into circulation. However in cases where products produced by illegal use of trade secrets are about to enter the market it will often be possible to obtain an interim injunction.

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? :

It is of course necessary to strike the right balance between protecting trade secrets on the one hand and on the other hand maintaining and facilitating competition, i.e. not place unnecessary restraints on trade. An important part of striking the right balance would seem to be to limit the protection to the “real” trade secrets and not expand the protection also to more general knowledge etc. In particular legitimate free movement of employees must be secured by not imposing a too strict liability for use of trade secrets post-employment.

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

On a general level it is difficult to see the need for introducing such different obligations to different categories of employees. This seems best to be left to the parties' contractual freedom (within the limits of the applicable employee protection legislation).

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?

To the extent it is established that the information disclosed to the defendant constitutes trade secrets, i.e. that the "threshold" is met, it may be reasonable that the defendant is prevented from using the trade secret after the proceedings (in so far as and as for as long as the information is protected as trade secrets under the applicable law). In order to strike a fair balance between the claimant and the defendant, certain exceptions must apply. One must *inter alia* avoid that the defendant's freedom to operate after the proceedings is limited unreasonably by the fact that the defendant has gotten access to the claimant's trade secret. In this respect it will be important that the court have the possibility to assess this on a case-by-case basis.

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?

No, it is difficult to see why such obligation should apply to information developed independently - both prior to or after a court proceeding. To promote innovation and to foster competition it does not seem justifiable to create any exclusive right on a trade secret as such. If an independent development of the same is possible the protection should not encompass such independent development.

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 as a remedy and injunctive relief as a remedy serves two different purposes and should therefore not be seen to exclude each other. Thus, damages should be available independently of any injunctive relief as the trade secret holder may have suffered a loss due to a trade secret violation all though the requirements for an injunctive relief are not or no longer met.

Damages should in general be available as a remedy by default in order to make sure that (i) exploitation of trade secrets is not financially beneficial and (ii) the victim receives fair compensation.

Aspect (iv) - Proving infringement

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

no

If no, why not?:

Constructive knowledge of a trade secret by an ex-employee should not as a general rule be imputed to its new employer. The question of whether or not a new employer has knowledge of a trade secret should be left to the court to decide based on whether or not the burden of proof has been lifted by the claimant.

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 cases involving possible trade secret infringements evidence preservation orders and seizure orders should in general be available, as such measures may be vital *inter alia* to provide sufficient evidence for an infringement having taken place. If such remedies are not available the enforcement of trade secrets will be less effective which ultimately could lead to less innovation and economic growth.

To make sure that such remedies are sufficiently effective it seems in general important to be able to have the hearing taking place ex parte. If *ex parte* proceedings are not possible one might face the risk that the alleged infringer destroys evidence etc. However, sufficient safeguarding mechanisms must be built in, e.g. that the plaintiff must provide security and that the claimant does not have immediate access to the seized material.

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?:

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

In general one should of course avoid that the claimant gets access to any kind of surplus information, including new trade secrets of the defendant, as part of the seizure. It is therefore important that the seizure is conducted in a manner that does not grant the claimant immediate or uncontrolled access to the seized material. This could typically be done by the court appointing an independent technical

advisor who could assist the court in reviewing the seized material. Furthermore, if the claimant learns of new trade secrets during the course of a search or seizure, the court should also under certain circumstances be able to order that the claimant may not unduly use or pass on such trade secrets.

III. Proposals for harmonisation

25) Is harmonisation in this area desirable?

Protection of trade secrets involves several different branches of national law - e.g. unfair competition law, contract law, labour law and intellectual property law - and it would therefore appear that a great degree of harmonization through international agreements could be difficult to achieve. However, it should at the same time be possible to agree on certain principles that would provide a global minimum protection.

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.

Legitimate free movement of employees and securing growth and establishment of new business imply that the threshold for trade secrets should be set so that commercially less valuable/important information is not considered a trade secret.

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?

If an injunction or other similar remedies are not available because this will be seen as a restraint of trade, the trade secret holder should still be able to be awarded damages or a compensation corresponding to a reasonable license fee.

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

In principle all employees should be under the same obligation of confidentiality which should not be unreasonably extended post-employment.

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?

When it comes to protection of trade secrets during litigation, we believe that the possibility to present the evidence in camera and with the other party being subject to a duty of confidentiality, to be minimum requirements that should be available.

It should perhaps also be agreed internationally that the disclosure of a trade secret in a court case somewhere in the world should not necessarily have as its consequence that the trade secret is no longer to be regarded as a secret.

To invoke such protection, it should be sufficient for the party to specify why the information by its nature is protected as a trade secret. It would then be left to the other party to make objections against this, i.e. to argue that the information does not constitute a trade secret.

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?

If the action fails because the defendant had independently developed the information it is difficult to see that any confidentiality or non-use obligation should apply. The defendant should be able to decide what to do with the information, i.e. whether to keep it confidential or whether to disclose it.

Aspect (iii) - Valuation of loss

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

In order to ensure that trade secrets enjoy an effective protection it is generally important that the rules applicable to compensation (taken in the broadest sense) are sufficiently flexible and that the burden of proof for having suffered an economic loss does not become an obstacle for efficient protection. Thus, one should consider allowing the victim to choose between damages for economic loss, a reasonable license fee and surrender of the infringer's gain.

32) Should courts award moral damages?

no

Aspect (iv) - Proving infringement

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

In general measures to secure evidence outside of court proceedings on the merits of the case should be available. At the same time it is important to have appropriate safeguards in place to prevent that the defendant's own trade secrets are exposed as part of a seizure.

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

The claimant should under certain circumstances be under a confidentiality/no-use obligation applicable to trade secrets that the claimant has become aware of during a seizure.

Summary

Trade secret protection is not regarded as a restraint of trade in Norway. Under Norwegian law a trade secret is information being "specific" to an enterprise, having economic value and that the enterprise has maintained secret. General skills/knowledge is not regarded as trade secrets.

Norwegian law prohibits acquisition and use of trade secrets in “an unfair manner”. Employees are under a duty of confidence regardless of whether such obligation is set out in the employment contract. The duty of confidence would in principle be perpetual.

In Norway damages are available as a remedy for trade secrets violation. There is no basis for awarding damages for moral prejudices or for punitive damages.

Norwegian law protects trade secrets during court proceedings, including courts imposing a duty of confidentiality, oral hearing of evidence in camera and restricted access to rulings.

Norwegian law does not provide for discovery. However, all persons are obliged to make available as evidence documents, that are in their possession or of which they can obtain possession. Pursuant to Norwegian law evidence may also be secured outside a lawsuit.

When assessing harmonisation it is important to strike the balance between protecting trade secrets and not placing unnecessary restraints on trade. Protection should be reserved for the “real” trade secrets and not expanded to general knowledge. Damages should in general be available as a remedy. Protection of trade secrets during litigation is important, in particular the possibility to present evidence in camera and with the other party being subject to a duty of confidentiality. It should be agreed that disclosure of a trade secret during proceedings should not lead to the trade secret no longer being regarded as a secret.

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

N/A