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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.:

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

The protection of trade secrets has been considered as a form of restraint of trade within the following legal texts:

1. Civil Law; Turkish Civil Code article 2
2. Obligations Law; Turkish Code of Obligations article 57, 396; 444; 455
3. Trade Law; Turkish Trade Act article 54, 55
4. Labor Law; Labor Law article 25/II
5. Patent Law; Decree Law No 551 Pertaining to the Protection of Patents article 36
6. International Conventions; TRIPS article 39

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?

"Trade secret" hasn't been defined in national legislation; thus there are no provisions setting the criteria to determine the difference between the knowledge and experiences with general qualifications acquired during labor relations and secret knowledge or trade secret.

In the article 3 of Law Draft on Trade Secret, Bank Secret and Client Secret, which is pending before the Grand National Assembly of Turkey for a long time; the scope of trade secret has been defined as "Trade secret consists of knowledge, document, electronic records and data which is only known, acquired by certain number of members and other personnel of a business organization or a company relevant to the scope of the company and which shouldn't be known by its rivals and shouldn't be exposed o third parties and public and has a great importance for the success and productivity of the enterprise and company in the economic life and which is regarding internal company structure and organization, financial, economic, credit and cash status, research and development works, activity strategy, raw material resources, technical characteristics of its manufacture, pricing policies, marketing strategies and expenses, market shares, wholesaler and retailer client potential and networks, contractual connections subject or not to permit".

And in the doctrine, "trade secret" is in general defined as "the knowledge about the company known by a limited circle and which the company wishes to keep it secret as it creates certain benefits for company"

Whilst the knowledge qualified as " trade secret " is protected by legal arrangements during the course of employment and after the termination of if there is a provision within the employment agreement; general skills or knowledge acquired during the course of employment can't benefit from protection regarding trade secrets. It is possible to prohibit to disclosure such knowledge or general skills only if they are against the employee's duty of loyalty depending on the concrete case throughout the course of employment.

Again, knowledge with the qualification of trade secret is subject to criminal protection in accordance with Article 239 of Turkish Penal Code.

Thus, in accordance with Article 239 of Turkish Penal Code, "The person who gives or discloses the knowledge or documents qualified as trade secret, bank secret or client secret that is known by his title or duty, occupation or workmanship to unauthorized persons shall be sentenced to imprisonment between one and three years and judicial fine up to five thousand days".

However, it should be stated that the principle of "interpretation in favor of the employee" which dominates the labor law is also considered while assessing whether the knowledge obtained by the employee is a trade secret or general knowledge.

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 have the obligation of "confidentiality" during the course of employment in accordance with good faith principle under Article 2 of Turkish Civil Law, the unfair competition rules under Article 57 of Turkish Code of Obligations, the rule of "employee's duty of loyalty" under Article 396 of Turkish Code of Obligations as well as Article 25/II of Labor Law.

Especially Article 396 of Turkish Code of Obligations stipulates that the employee shall not provide services to a third party for a fee against his duty of loyalty and shall not compete with his own

employer, in particular. Again in accordance with the provision of the same article, the employee shall not use the information such as manufacturing and business secrets which he has acquired during the course of his performance, for his own benefit or disclose the same as long as the employment relationship continues..

Pursuant to the last paragraph of the same provision; the employee shall be liable to keep secrets even after termination of the employment relationship to an extent as required for protection of the employer's rightful interests.

Within the framework of the doctrine, the prohibition of competition is deemed to involve the confidentiality obligation of the employee. This is because; the actions of employee against the prohibition of competition generally become a matter when the employee uses the professional and trade secrets acquired during his term of employment.

Whilst the confidentiality obligation originating from the law is a matter solely for the information considered as "trade secrets"; type and groups of information subject to this protection may be extended upon agreement.

As a matter of fact, the obligation to keep some information which is not deemed trade secrets, as confidential may be imposed and the use of such information falling outside the scope of the relevant prohibition may be restrained with an agreement.

As a rule; an arrangement made with an agreement to that effect, ensures continuance of the confidentiality obligation/use of trade secrets which will normally expire upon termination of the employment relationship.

In our opinion, the two-year restriction stated in the provision that "the period of non-competition may not exceed two years except special conditions and terms" brought with an agreement, in Article 445 of Turkish Code of Obligations is inapplicable to trade secrets. The fact that employee has acquired trade secrets in his previous workplace and the employer has benefits when these secrets are not disclosed shall prevent non-competition from being subject to a time limitation.

However, it should be noted that provision of non-competition introduced with an agreement, cannot involve limitations which are not appropriate in terms of place, time and type of works in a way that will inequitably put employee's economic future into danger.

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 principle, an employee's confidentiality obligation ends upon termination of the employment. However, as per Article 396 of Turkish Code of Obligations, the employee is obliged to keep secrets even after termination of the employment relationship to an extent as required for protection of the employer's rightful interests.

There is no legal regulation as to how long the confidentiality obligation shall in effect after Termination of the employment relationship in the absence of any agreement executed by and between the parties.

The legal resource referred in this respect, is the principle of good faith set forth in Article 2 of the Civil Code. In fact, the disclosure/use of the trade secrets after cease of employment against the principle of good faith shall give rise to unfair competition under Article 55/d of the Turkish Commercial Code.

In the doctrine, the criteria of knowledge not having the qualification of a business secret or the end of employer's interest for confidentiality are also referred.

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 not prohibited by an agreement, employees may use the information they have acquired at their previous workplaces in principle.

The exceptions to this rule are the situations which are contrary to Article 396 of Turkish Code of Obligations stating that the employee is obliged to keep secrets even after termination of the employment relationship to an extent as required for protection of the employer's rightful interests and for good faith in accordance with Article 2 of the Civil Code.

Employees shall be able to use the information and experiences they have acquired at their previous workplaces with no qualification of being trade secret for their new workplaces unless otherwise is stated in an agreement.

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 scope and level of employee's confidentiality obligation may vary according to his position at the workplace and thus, the confidential information/trade secrets acquired due to this position.

Hence, within the special qualification brought to representatives of employers under the Article 553 of Turkish Code of Obligations, representatives of employers who runs the whole business of an enterprise shall limitlessly acquire all business information and trade secrets on the basis of the extended prohibition of competition.

Similarly, Article 26 of the Decree Law No. 551 stipulating that "where the confidentiality of the operational secrets of the enterprise requires that a an application shall not be filed, an employer's obligation to file such an application shall terminate" and Article 36 stipulating that "An employer shall keep confidential/secret the information/data concerning an employee's invention that has been reported or notified to him, for as long as required by the legitimate interests of the employee" also introduce the confidentiality obligation as to the employee's own invention created during his term of employment at the relevant workplace. Herein, the employee's confidentiality obligation for the trade secrets of an enterprise that is information for which the employee can lay a claim is in question. In other words, confidentiality of trade secrets of the enterprise brings upon an obligation of confidentiality for the employee who created the invention that is the subject of this secret not to expose his very own invention here.

In this respect, it should be pointed out that condition of prohibition of competition will be valid only if the service relationship provides the worker to acquire information about customer circle or production secrets or business activities done by the employer and as well using this information is at the capacity to cause a significant loss of the employer (Article 444 of the Turkish Code of Obligations).

Aspect (ii) - Ensuring confidentiality during Court proceedings

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

proceedings?

There are no explicit provisions within our legislation foreseeing the measures to be taken for protection of the parties' trade secrets during Court proceedings. Whilst the mechanisms for protection of the parties' trade secrets are not explicitly provided, it would be possible to come to several conclusions based on dominating principles of jurisdiction within Code of Civil Procedure and Turkish Law.

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;

In the proceedings where disclosure of a trade secret is in question, there is no explicit regulation regarding restriction of the parties' access to the hearing. On the top of that, with the principles dominating the legal proceedings and general regulations stipulate that a party's access to the hearing cannot be restricted under any circumstances whatsoever.

Although it can be ruled for partial/complete confidentiality of hearings provided that the conditions set forth in Article 28 of the Code of Civil Procedures and Article 141 of the Constitution are fulfilled; such confidentiality decision shall not be rendered in a manner to prevent a party from attending hearings or eliminate the publicity of a party. Elimination of the publicity, as foreseen in the relevant Articles, may only be in question against third parties with the reasons of "public safety" or "public morality". Even though the law text explicitly provides that the decision of confidentiality shall be taken only when it's required for public safety and public morality; it's considered in accordance with some opinions within the doctrine that the decision of confidentiality may be taken for the trials where the disclosure of parties' trade and professional secrets are in question, etc.

The principle in terms of the access to evidences presented by the parties to the file is that the parties are able to examine all the documents in the file freely in accordance with the principle of publicity of trial. Similarly, despite absence of an explicit provision in the regulation; the parties' access to evidences may be restricted by the judge if such documents are considered to fall into the scope of the confidentiality decision. However, in accordance with the fair trial and equality of arms principles; this practice should be adopted in an equal manner for both parties. For instance, a restraint for the accession of only one of the parties during the investigation and explorations even with the reason of trade secrets shall not be in question. Again, if only one of the parties is allowed to examine the documents within the scope of the file; this will be deemed violation of the right to a fair trial.

In fact, the Code of Civil Procedure comprises regulations as to the parties' access to the documents which have been decided to be kept confidential. Firstly, a copy of documents which are deemed to be confidential under Article 158/2 of the Code of Civil Procedure may be provided only with express consent of the judge and also the examination of documents and written proceedings which are decided to be kept confidential depends on the express consent of the judge in accordance with Article 158/2 of the Code of Civil Procedure. The preamble of Article 161 stipulates that none of the documents regarding the proceedings shall be hidden from the parties and from those attending the proceedings. In this sense, parties and attendants would be able to examine the documentation of the proceedings anytime complying with the rules. As is confirmed by the referred preamble, it is essential for the parties to examine all the documents and written proceedings within the file and there is no regulation restricting only one of the parties from examining any documents even though its confidentiality is envisaged.

No discrimination is foreseen as to the scope of the documents, in continuation of the preamble of Article 161. As per the preamble; the parts on other issues which are not directly related to the subject matter of the case may be among the documents presented to the file and these parts

might have given rise to the decision of confidentiality. Decision by the judge for the scope of copy of such documents to be provided to parties and attendants has been endorsed in terms of confidentiality.

As per the regulations of the Code of Civil Procedure; any kind of documents shall be included in the court file and shall be examined by the judge even if the documents include confidential information. However, in terms of an open access to documents by the parties, the judge may only restrain the examination of the parts of information and documents which "are not directly related to the subject matter of the case" and which are deemed "confidential". Accordingly, we are of the opinion that if the document parts comprising trade secrets are directly related to the subject matter of the case, such documents would be available for the parties' examination in order not to restrict a party's right of defense.

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

There are no such practices in our law for the disclosure of information/documents comprising trade secrets only to legal representatives, not to parties. The Turkish Law rules that the legal representative shares any information he/she may access in terms of the case with the client.

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

In line with the explanations above, non-confidential parts of the documents shall always be available for the parties' examination. Even if it contains trade secrets; if it's directly related to the subject matter of the case as laid down in paragraph (a) and it serves as a key evidence for solution of the case as per the perspective introduced by the doctrine, there wouldn't be any restraints for the parties' examination.

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

Publicity of court decisions is essential in accordance with the Code of civil Procedure and the Constitution. As per Article 28 of the Code of Civil Procedure introducing the principle of publicity; conduct of hearings and adjudication shall be public. Although one of the paragraphs of the referred Article involves a provision stipulating that closed hearings may be held, publicity of decisions shall not be eliminated. Despite the absence of an explicit provision in the regulations, decisions are publicly announced even if hearings are conducted closed to the public. Such elimination of publicity would be possible neither in accordance with the regulations, nor the doctrine even by an agreement between parties.

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?

For implementation of the above-given practices; firstly, trade secret holder should notify the court and submit sufficient evidence to convince the Court that the information merits protection. This is because; while the Court evaluates the evidences, it cannot make an ex-officio decision ruling that a document and/or information are trade secrets. The document and/or information holder should convince the Court that such information and/or documents include trade secret and they merit protection and he has a benefit in protection thereof. In this case, the Court would first examine whether this information and/or document includes trade secrets and in line with this examination would decide whether it will come under the scope of confidentiality.

In this respect, the provision set forth in Article 28/3 of Code of Civil Procedure could be implemented. In accordance with this provision, confidentiality request of the parties shall be examined at a closed hearing within the scope of provisions on preliminary questions and concluded.

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?

There is no provision stipulating that the Court may render a decision to prevent subsequent use of a trade secret disclosed by the plaintiff or defendant during the proceedings. Thus, the Courts are bound with the requests of parties in terms of civil justice and in practice the courts do not render decisions to that effect.

However, we consider that the confidentiality provision in Article 28/4 of the Code of Civil Procedure foreseeing the judge to warn the parties might be implemented by analogy. In accordance with the provision in question, the judge shall warn the attendants to closed trial proceedings about the confidentiality of the information they would acquire; notify the parties of that the confidentiality provision of the Turkish Penal Code No. 5237 shall be implemented; and shall have this issue written to the hearing minutes.

Similarly, we could expect the judge to warn the other party not to use the disclosed information during the proceedings. However, this cannot be included in the written decision as a provision.

Although the judge may not enact a decision intended for preventing the opposing party from using the trade secrets disclosed during the proceedings; the party which had to disclose its trade secret would be able to request prevention of unfair competition to arise out of the relevant use by filing another action as per Article 55 on unfair competition of the Turkish Commercial Code. Under the circumstances, the party which had to disclose its trade secrets during legal proceedings and faced with violation, shall be entitled to file another action for determination, prevention of unfair competition and elimination of the consequences thereof, and to request indemnification of the damages incurred by it.

In our opinion, the holder of the trade secret may file such a counter-action for prevention of unfair competition even in the course of the proceedings of the case where trade secrets have been disclosed provided that the conditions stipulated in the law have been fulfilled. If the party didn't have to disclose its trade secret yet, but deems such disclosure necessary during the proceedings, it may request prevention of any possible unfair competition to take place.

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?

Trade secrets are deemed as confidential information by their very nature and they can provide commercial interests only if they are used by their proprietor and/or under the control of the same. Such confidential information shall no longer be deemed trade secrets if they are disclosed and made available to the use of a great number of people; the proprietor of such information will lose his commercial interests and the value of trade secret will be diluted.

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?

Generally the provisions of Code of Obligations and Trade Act, especially the ones regarding unfair competition are implemented within the scope of the current regulations on trade secrets, in the Turkish Law. Within this scope, it's possible to claim pecuniary and non-pecuniary damages in case of violations of trade secrets.

The Court may consider the interest which opponent has obtained or may obtain as a result of unfair competition as a pecuniary damage, or the damages or claimer on demand. Possible profit loss of the claimer and in this case the income that is possible to be earned by the claimer through copyrights or license are also considered within this scope.

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:

The Turkish Laws grant the right to file an action for damages against the real person violating confidentiality of trade secret. Within this framework, the aggrieved party should have had a mental breakdown, shouldn't have received any indemnities or the indemnity received should be insufficient.

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

In case the person, whose trade secret has been violated, is a legal person; such legal person would also have the right to claim for non-pecuniary damages depending on the damages to their commercial standing. The judge determines the amount of non-pecuniary damages in accordance with the characteristics of the case and the level of opposition of the relevant act to the applicable laws, abiding by the claims.

Aspect (iv) - Proving infringement

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

The elements to be proven in order for an action for damages to be filed in accordance with the "unfair competition" provisions of the Turkish Commercial Code predicated on the violation of trade secret - in addition to presence of a trade secret - are the actions against good faith and occurrence of damages or danger of having damages with a casual connection with the preceding element.

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?

Violation of the confidentiality obligation and violation of trade secrets have been envisaged as two different types of violations. Whilst the obligations of general loyalty and confidentiality are obligations imposed on the employee and dependent on different consequences, trade secret may be asserted against anyone. There might also be situations where these two overlap.

Within this context, the additional aspect to be considered in the case of violation of trade secret is that the information disclosed through violation of confidentiality is deemed a trade secret.

12)	<p>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?</p> <p>yes</p> <p>If so, in what circumstances? :</p> <p><i>Whilst the employment relationship between the employee and the workplace continues, the employee has the confidentiality obligation which is a consequence of duty of loyalty. If the employee discloses the business secrets which he has been allowed to acquire due to the environment of trust established through the relevant employment relationship, to a third party despite having been authorized to do so; , the employee violates the duty of loyalty and thus the employment agreement.</i></p> <p><i>When the employment relationship between the employer and the employee ends; the duty of loyalty also ceases to exist. However, as it is stated above; the employee shall be liable to keep secrets even after termination of the employment relationship to an extent as required for protection of the employer's rightful interests, and generally special provisions are added to the employment agreements, stipulating that the referred obligation shall cover a longer period with respect to the information having the characteristics of trade secrets.</i></p> <p><i>Accordingly, the employer's interests in terms of protection of trade secrets and the employee's interests in terms of performing his job without being subject to any restrictions as to his vocational knowledge and skills may be in conflict.</i></p> <p><i>Within the scope of this question; namely if the employee conveys not the trade secret but the "constructive knowledge" to his new workplace; an assessment based on Article 2 of the Civil Code would be appropriate. The first to take into account would be the determination whether "constructive knowledge" is general knowledge which the employee has acquired by experience and skills. In case the employee or the new employer uses/have the "constructive knowledge" used acting against the principles of good faith, violation will be in question.</i></p>
13)	<p>Does your jurisdiction provide for discovery?</p> <p>yes</p> <p>If yes, does it provide for discovery at the pre-action stage; and / or against third parties?:</p> <p><i>Discovery exists within Turkish Law and it is possible to conduct a discovery before filing an action or during the proceedings.</i></p>
14)	<p>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?</p> <p>yes</p> <p>If yes, what is this threshold?:</p> <p><i>In the Turkish Law, as a general rule; the burden of proof rests with the party who has derived benefits out of the legal consequence connected to the claimed facts unless otherwise stipulated in the law. The party depending on a legal presumption only has the burden of proof regarding the contingency underlying the presumption. Besides the derogations envisaged in the law, the opposing party may prove opposite of the presumption.</i></p>
15)	<p>Does your law provide for any other methods for securing evidence, such as seizures or ex parte measures?</p> <p>yes</p>

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 Code of Civil Procedure within the Turkish Law, each party may request procedures such as discovery, expert examination or hearing of the witnesses for determination of a fact claimed within the framework of a present case, but not examined yet or to be claimed within the framework of a future case. Existence of legal interest is obligatory and sufficient to request determination of evidence. Other than the circumstances explicitly provided by the laws, it shall be deemed to have a legal interest in cases where the evidence may get lost or it may become highly difficult to claim it.

Evidence shall be examined on site in case of determination of evidence and discovery. Sampling could be decided if deemed necessary by the judge.

In case there is a possibility that opposing party may hide the evidences or act in bad faith, it may also be claimed in the absence of determination of evidence or discovery. The person objecting to such discovery shall bear the consequences thereof. In addition to other sanctions which the judge may consider as appropriate; if the person objecting to discovery is the party with the burden of proof, such party may be considered to have waived of such evidence and if it's the opposing party, he/she may be considered to accepted the claimed fact.

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?

Within the framework of the Code of Civil Procedure it is possible to request preliminary injunction. The preliminary injunction decision may be rendered in order to seize evidence, prevention of use or maintenance of the existing conditions in line with the matter of dispute.

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?

no
If not, why?:

The group doesn't consider a legal regulation imposing restriction upon the protection of trade secret as recommendable. On the contrary, the group believes that such a restriction would give rise to a failure in effective protection of a trade secret. Instead, the group recommends explicit definition of the term "trade secret" in the law and believes that this shall eliminate attempts to unfairly restrict trade on the ground of trade secret.

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

Group is of the opinion that restrictions of confidentiality and non-competition may be applicable within a different scope and with different characteristics, to the employees working at a workplace with different duties and positions.

As a matter of fact, whilst some employees can easily access operational information such as client list due to their manager status; some of them, for instance engineers working at the department of research and development directly access the information about manufacturing techniques and innovations. In this case, it would be more appropriate to assess the scope and level of the liability to

keep such information confidential and not to compete using this information, in accordance with the duties and positions of employees. This discrimination would be more meaningful in terms of the confidentiality obligation determined by an agreement especially after the employee quits the job. Such discrimination would avoid an intense and unnecessary restriction imposed on an employee who is not at a position/status to allow him to acquire the secrets of enterprise, and who is unqualified or irrelevant to such information.

Of course, this assessment shall be regarding the information acquired in accordance with the law.

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?

Whilst there is no explicit provision in the regulations; as part of the general regulations, with regard to the person against whom an action has been filed for violation of trade secret and who has been aware of the trade secret due to the referred legal proceedings, any obligations not to use this secret after the proceedings wouldn't occur. In other words, the Court can't decide for prevention of the disclose of a trade secret which the opposing party has learned about automatically as a result of the action filed and who hasn't disclosed the subject matter trade secret as of and before the filing date of the action. However, as per the principle of honesty; the defendant shall not use this trade secret which it has acquired during the legal proceedings. If the opposing party violates confidentiality of the other party's trade secret obtained during the proceedings, after finalization of the proceedings; this situation would constitute the subject matter of another case regarding violation of the confidentiality of a trade secret.

- 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?

Such an obligation does not cover the information which has been independently developed/acquired by the defendant before the action is filed, finalization of the legal proceedings or the action filed against the defendant has been dismissed so that a connection between the information developed by the defendant after the legal proceedings and the trade secrets acquired during such proceedings could be established.

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?

no
If not please comment.:

In case of a fault and violation, an indemnification should be decreed due to damages exposed or possible profit lost. The same situation should be applicable to the cases where it is not possible to rule for preliminary injunction or preliminary injunction has not been ruled. As a matter of fact, the defendant is under the obligation of non-infringement even in the absence of a decision for preliminary injunction.

Even in the cases where preliminary injunction is decided and the violation is prevented in this way, claims can be made due to violations until the date of injunction.

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? :

In this case, the employee's intention in disclosing the main information about a trade secret to its new employer should be considered important. Whether the employee or the new employer acted against the rule of good faith under Article 2 of Code of Civil Law should be examined.

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?:

Determination of evidence and preliminary injunction should be possible before the proceedings. In case these claims are examined at a hearing, in accordance with the Code of Civil Procedure, it's obligatory to grant the right to attend and defense to the opposing party. However, in case of an examination on the file, statement of the opposing party shall not be taken.

Judge has the power of discretion as to whether the relevant request will be notified to the opposing party, or not and he/she must use this power considering statements and evidences of the party that claims that its trade secrets have been violated. If the claimant has proven his claim sufficiently, determination of evidence and/or preliminary injunction shall be accepted.

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?:

Determination of evidence and preliminary injunction should be possible before the proceedings. In case these claims are examined at a hearing, in accordance with the Code of Civil Procedure, it's obligatory to grant the right to attend and defense to the opposing party. However, in case of an examination on the file, statement of the opposing party shall not be taken.

Judge has the power of discretion as to whether the relevant request will be notified to the opposing party, or not and he/she must use this power considering statements and evidences of the party that claims that its trade secrets have been violated. If the claimant has proven his claim sufficiently, determination of evidence and/or preliminary injunction shall be accepted.

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

Despite the absence of a provision in the Turkish Law, stipulating that the Court may render a decision to prevent subsequent use of a trade secret disclosed by the party against which determination or injunction is requested (see Question 8), by the other party as is the case with the defendant; we deem Article 28/4 of the Code of Obligations, foreseeing the judge to warn the parties, as applicable by analogy. In this way, we can expect the Court to warn the party requesting non-use of the disclosed information; however, a written decision as a decree wouldn't be possible.

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.
	<p><i>Group has the opinion that a legal application attempted for the confidentiality in the cases below may be rejected in that this attempt gives rise to de facto restriction of free trade:</i></p> <ol style="list-style-type: none"><i>1. Claimant has explicit bad faith;</i><i>2. The information desired to be kept confidential is considered as a trade secret within the scope of a broader definition than it should be; if it's not actually a trade secret or has lost this qualification;</i> <p><i>Herein, clear definition of the term "trade secret" in the law would provide an objective criterion for resolution of the problem.</i></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><i>In this kind of a situation, judge should make a decision considering balance of interests in accordance with the characteristics of every concrete case and evidences presented to the file for a just and fair resolution of the issue.</i></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><i>Although there is no explicit legal regulation on this issue, employees who work under a strict obligation of confidentiality, the obligation in question will be eliminated if</i></p> <ol style="list-style-type: none"><i>1. There is a legal obligation or in accordance with the instructions by competent authorities;</i><i>2. The confidential information is not a trade secret or lost this qualification, and the employment agreement has been terminated;;</i> <p><i>The employer has no interest in keeping such information confidential.</i></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><i>While trade secret is worth protecting during proceedings, we consider the regulation providing non-</i></p>

closure of the proceedings to the other party is rightful. Within this scope, a practice such as "for attorneys' eyes only" could be adopted; however, it would be appropriate for the legal representative in need of technical help to receive support from a technical expert under the confidentiality obligation and approved by his/her client during the proceedings. Trade secret defense should be evaluated by the Court at the first step as a preliminary issue and a decision should be made about it.

As per Article 277 of the Code of Civil Procedure; experts shall be liable to keep the information acquired during the performance of their duties as confidential and to avoid using such information for their own interest or the interests of third parties.

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?

Since the knowledge obtained in this kind of a situation can't be deemed a trade secret, obligation of confidentiality/non-use wouldn't be applicable.

Aspect (iii) - Valuation of loss

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

There are no explicit rules regarding the estimation of damages incurred due to violation of trade secret. Within this context, items of pecuniary and non-pecuniary damages shall be estimated in accordance with general rules of the Turkish Commercial Code.

The person whose trade secret has been violated and who has suffered from this act of unfair competition shall be able to claim his/her damages. Filing this action depends on the fault of offender and damages of claimant. In this case, the claimant would prove the offender's fault, amount of damages and casual connection. The amount may be determined considering opponent's profit or the loss incurred by the claimant.

32) Should courts award moral damages?

yes

If so, how should they be quantified?:

Non-pecuniary damage may be claimed and if the claimant is a company, loss of reputation and aggravation of the violation, if the claimant is a real person, mental anguish and the aggravation of violation shall be taken into consideration.

Aspect (iv) - Proving infringement

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

The right holder who thinks his/her trade secret has been violated, may request protection of evidences through preliminary injunction from the Court before or during the proceedings for the protection of evidences to be taken as basis in a possible future action. Similarly, the right holder who suspects that his/her rights have been violated may request determination of evidence through discovery and expert examination with an application of "determination of evidence" before filing an action in case there is a possibility of the loss or change of evidences.

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

It is important to prevent any subsequent use of the evidences seized during the proceedings, by the plaintiff. Within this scope, although it's not possible in accordance with the applicable provisions of the Code of Civil Procedure, the most suitable option would be to enable the Court's to rule for determination against the plaintiff, upon the defendant's request within the scope of a case on trial, and to prohibit the plaintiff's subsequent use of the evidences seized, after finalization of the proceedings.

Summary

According to Turkish Group:

Although Turkey does not still have any specific code on trade secrets protection in force, trade secret is protected through various provisions especially according to Commercial Code, Labour Law, Civil Code, and Obligations Code by viewing also as a form of restraint of trade. However, these provisions are mostly general rules such as principles of honesty, loyalty and duty of care of employee or duty of fair trade of competitors and are not satisfying the need for an optimal legal protection of trade secret. On the other hand, the non-disclosure and non-use agreements either included in a contract of employment or settled separately are generally accepted in the Turkish Code of Obligations with the obvious reserve of reasonable conditions particularly to ensure a safe economic future and freedom of labour for the employee and the safeguard of public interest. Even the employees are under a duty of confidence whether or not such a duty is set out in their contract of employment in accordance with provisions of Labour Law and Obligations Code, it is advisable to include such a non-disclosure - non-use clause in a contract, to prevent the disclosure of any information and trade secret of the company either after termination of the contract of employment. The absence of a specific provision or any specified code defining the trade secret is clearly unsatisfactory for protection of trade secret; especially it is not clear to define the frontiers for trade secret and liberty of labour or the right of free competition. When there is a conflict in relation to trade secrets, ensuring confidentiality of trade secret during court proceedings is problematic as the proceedings must be public and the relevant documents must be shown at least to the counter party. The lack of any specific provision about trade secrets also creates problems as to the calculation of the damages occurred due to misuse or unlawful disclosure of trade secrets. The Turkish Group is of the opinion that the long-needed specific code or provision should also regulate the principles for quantifying damages for trade secret violations and measures to preserve the secrecy of trade secrets during Court proceedings.

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