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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.:

In Venezuela trade secret is regulated under article 39 of the Trip.

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?

Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by practices so long as such information:

- a. is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

- b. has commercial value because it is secret; and
- c. has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret

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

Yes

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?

There is no a fixed term only contractually

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?

no

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

no

#### Aspect (ii) - Ensuring confidentiality during Court proceedings

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

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;

Yes, at the free competition (PROCOMPETENCIA) agency.

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

Yes, at the free competition (PROCOMPETENCIA) agency

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

Yes,

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

Yes,

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?

To our knowledge there is no case at a Court to rely upon

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?

To our knowledge there is no case at a Court to rely upon

Aspect (iii) - Valuation of loss

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

Aspect (iv) - Proving infringement

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

Is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; has commercial value because it is secret; and has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

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?

The Breach of trust is regulated by the Commercial and Civil Code and also can be contractually regulated

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? :

Yes if the Natural and legal persons does not do anything to prevent information lawfully within their control from being disclosed

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?
	no

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?
	Currently none

## 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 will depend on a case by case basis. In the pharmaceutical area data protection commonly has 5 year term.

18)	Should different obligations of confidence / non-use apply to different employees? Why/why not?
	It will depend on case by case basis

### Aspect (ii) - Ensuring confidentiality during Court proceedings

19)	Should a defendant, who is sued unsuccessfully for a trade secret violation, and who learns of the trade secret during the course of the litigation, be required to not use the trade secret after the proceedings? Why/why not?
	There are no cases to rely on

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?
	There are no cases to rely on

### 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.:

Damages are established in Venezuela by Law

Aspect (iv) - Proving infringement

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

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

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

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

no

If not please comment.:

Currently no seizure are granted by governmental policy

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

Currently no seizure are granted by governmental policy

### III. Proposals for harmonisation

25) Is harmonisation in this area desirable?

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.

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?

principles for quantifying damages for trade secret vilations can be implemented like loss profit.

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

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?

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?

Aspect (iii) - Valuation of loss

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

32) Should courts award moral damages?

Aspect (iv) - Proving infringement

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

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

Summary

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