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## Trade secret protection in competition infringement cases

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#### **Introduction**

Protecting a company's critical information is an essential factor to consider in conducting any business. It also has an incredibly significant impact on parties' litigation strategies if it becomes necessary to initiate court proceedings or defend against legal action. This is particularly evident in cases concerning competition law infringements.

In such cases, how can a party adequately protect its trade secrets from being disclosed at the request of the opposing party, or when such a disclosure is necessary for the party's own argument?

In recent years, Poland has introduced regulations to equip parties with new tools in this regard. This is in addition to the previously existing institutions, which can also be used to ensure the desired protection in these two instances. Still, much depends on the approach of the court and the active role of the parties concerned.

#### **Definition of "trade secrets"**

In 2018 the Act on Combatting Unfair Competition (the act) was amended and a new definition of "trade secret" was introduced.

Under article 11(2) of the act, a "trade secret" is technical, technological or organisational information or other information with an economic value of an enterprise which, as a whole or in a particular combination of its elements, is not generally known to individuals who usually deal with that type of information or is not easily accessible to such individuals, provided that the person authorised to use or dispose of the information has taken, with the exercise of due diligence, actions to keep it confidential.

### **Release or disclosure of evidence in IP cases**

On 1 July 2020 new provisions of the Code of Civil Procedure (CCP) entered into force concerning IP proceedings relating, among other things, to preventing and combatting unfair competition.

The provisions introduce a new institution of releasing or disclosing evidence, which constitutes an extended implementation of article 6 of Directive 2004/48/EC. This regulation provides, in particular, that if a request for the release or disclosure of evidence is accepted and the defendant claims the need to protect trade secrets, the court may specify rules for using and becoming familiar with the evidence and impose additional limitations (article 479[109](1), sentence 2 of the CCP).

Moreover, when it comes to the disclosure or release of evidence pertaining to bank, commercial or financial documents, there are provisions in the CCP that mean the documents may be inspected by the court at the location where the documents are kept (eg, at the company's headquarters) or that the appointed judge may review the relevant documents and prepare the necessary extracts from them (article 479[111] in conjunction with article 249(2) of the CCP).

The aforementioned amendment to the CCP also introduced new solutions concerning the securing of evidentiary means, which provides for certain procedural guarantees ensuring the protection of trade secrets even prior to the commencement of proceedings (article 479[96] *et seq* of the CCP).

According to the general rule, when applying the aforementioned measures, Polish courts are obliged to follow the principle of proportionality. Under this principle, the court considers the parties' interests to such an extent as to provide appropriate legal protection to the authorised party but not burden the obligated party or the defendant

beyond necessity – taking into account the burden on the obligated party or the defendant resulting from the measures applied and the trade secrets protection (article 479[95] of the CCP).

### **Disclosure of evidentiary means in private enforcement cases**

A separate regulation on disclosure is provided for in the Act on Claims for Damage Caused by Infringements of Competition Law, which entered into force on 27 June 2017 and implements EU Directive 2014/104.

Both the victim and perpetrator of an infringement of public competition law may use this measure. Article 23 of the act on claims provides, among other things, that if evidence is obtained as a result of disclosing documents which contain a trade secret or other secret protected under separate regulations, and it is necessary to prevent the disclosure of such secret, the court – acting on the motion of a party or third party obliged to disclose the means of evidence, or acting ex officio – may, to the extent necessary, limit the right of other parties to inspect such evidence or set out detailed rules for such inspections and use of the evidence (including by limiting or excluding the copying or recording of such evidence in another).

### **Hearings held in camera**

Further, each party before the court has the right to request that all or part of the hearing be held in camera when evidence concerning its trade secrets may be disclosed (article 153(1[1])). If the request is granted, the following may be present during the hearing (according to article 154(1) of the CCP):

- the parties;
- interveners;
- the statutory representatives and attorneys;
- the prosecutor; and
- persons of trust (two from each party).

This regulation may be applied not only in proceedings concerning competition law infringement, but also in other proceedings concerning commercial disputes.

### **Comment**

The current regulations make it possible to shape proceedings to ensure protection against the disclosure or unauthorised use of protected information to a greater extent than was possible a few years ago.

However, due to the lack of a comprehensive procedural framework, the parties and courts must seek individual solutions tailored to the procedural needs of the parties and the nature of the information to be disclosed on a case-by-case basis. Polish law does not regulate information protection measures used in other jurisdictions through measures such as:

- confidentiality rings;
- data rooms; or
- ordering experts to summarise information and present it in a collective form.

However, the application of these methods in Polish proceedings is not excluded.

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