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Trade Secrets 2022

Switzerland: Law & Practice
and
Switzerland: Trends & Developments

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SWITZERLAND

Law and Practice

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1. LEGAL FRAMEWORK

1.1 Sources of Legal Protection for Trade Secrets

International Legislation

Switzerland is not a member of the EU. Consequently, it is not obliged to implement and has not implemented the EU Trade Secrets Directive (“EU TS Directive”) in its national law.

Switzerland is a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Right (TRIPS), which explicitly addresses trade secret protection in Article 39.

National Legislation

There is no separate statute in Switzerland that exclusively governs trade secrets. Rather, there are several sets of isolated provisions in various statutes. The following are the most relevant statutes under Swiss law:

- the Swiss Federal Act against Unfair Competition (UCA);
- the Swiss Criminal code (CC);
- the Swiss Code of Obligations (CO), in particular its sections on employment law, agency law and corporate law;
- the Swiss federal act on data protection (FADP);
- the codes of procedure (civil, administrative, criminal) related to the protection of trade secret in proceedings before courts and administrative bodies.

As a consequence of the scattered nature of the legal sources, Swiss law does not have one single unified theory to protect all trade secrets. Instead, depending on the circumstances, trade secrets will be protected under the doctrine of tort law, contracts or criminal law.

In short, Swiss law does not treat trade secrets as a formal intellectual property right, but as a

factual position that still enjoys a strong protection under various applicable legal sources.

1.2 What Is Protectable as a Trade Secret

There is no statutory definition of the term “trade secret” in Swiss law. However, legal doctrine and case law have provided a definition based on four cumulative conditions. A trade secret is thus defined as any information:

- that is neither publicly known nor generally accessible/commonly available, nor self-evident;
- that has a commercial value;
- the owner of which has a legitimate interest in maintaining it secret (objective interest in secrecy); and
- the owner of which intends to maintain it secret (subjective interest in secrecy).

Some authors and the Swiss Criminal Code distinguish between “manufacturing secrets” and “business secrets”. Manufacturing secrets relate to knowledge of manufacturing methods and processes. Business secrets relate to information on economic activities other than the actual manufacturing process, such as knowledge about supply sources and strategy. This distinction is merely theoretical and has no practical relevance; both manufacturing secrets and business secrets are protected without distinction.

1.3 Examples of Trade Secrets

Swiss law does not have a separate statute exclusively dedicated to trade secret protection. Therefore, there are no statutory lists of trade secrets, even by way of example.

The Federal Act against Unfair Competition provides some indirect examples of what may be protected as trade secrets, such as:

- work results, offers, calculations or plans;
- work product ready for market.

In addition, Swiss courts have qualified as trade secrets:

- price calculations;
- lists of clients;
- distribution channels;
- insights into technical know-how;
- customer needs;
- management information and information on financial activities;
- resolutions of the group management;
- content and scope of patent applications before their publication;
- construction plans;
- information on a company's market share;
- plans related to transformation or splitting of a business;
- source code of a computer program; and
- data of bank clients.

1.4 Elements of Trade Secret Protection

Please see **1.2 What Is Protectable as a Trade Secret** for the four key elements of trade secrets.

1.5 Reasonable Measures

One of the four cumulative conditions of a trade secret is the subjective intent of the owner to maintain secrecy. This intent must be discernible, *inter alia*, through the reliance on reasonable measures to protect secrecy. There is no statutory definition of what counts as such “reasonable measures”. The test is generally considered to be objective – ie, measures that a person or entity in the same industry would take in good faith in order to protect the secrecy of the same category of information.

1.6 Disclosure to Employees

Employees are not allowed to exploit or reveal trade secrets obtained while in the service of the employer. This duty of confidentiality includes

all confidential information of which the employee becomes aware while in the service of the employer, irrespective of whether the disclosure was planned or accidental. Furthermore, the duty of confidentiality continues even after the end of the employment relationship to the extent required to safeguard the employer's legitimate interests.

1.7 Independent Discovery

Under Swiss law, independent discovery, reverse engineering and autonomous development of commercially valuable knowledge is allowed, even if another person has owned the same knowledge as a trade secret. This applies as long as no patents, designs, copyrights or other protected rights are infringed and no contractual obligations are breached.

In case of independent discovery, two different people or entities can own the same trade secret without infringing on the legal position of one another. In case of voluntary disclosure by one of the owners, the protection of the trade secret of the other owner will cease because the information will be in the public domain.

1.8 Computer Software and Technology

Computer software and computer programs are protected, among other things, by the Swiss Copyright Act (CopA). In addition, software source code is generally maintained secret and can constitute a trade secret.

Under the CopA, anyone who is allowed to use computer software (typically under a licence agreement) may decompile the machine code into source code, but only in order to establish, maintain or use interfaces to other programs. In particular, this does not allow publication or dissemination of the source code.

Additionally, the Federal Act against Unfair Competition prohibits the copying or exploitation of

marketable work results of another person by means of technical reproduction processes without making reasonable own efforts. This provision is especially significant in the context of software and other trade secrets in digital form, as such trade secrets can be easily duplicated without any effort.

1.9 Duration of Protection for Trade Secrets

Trade secret protection starts automatically when the four key legal elements according to **1.2 What Is Protectable as a Trade Secret** are met, and lasts as long as these four elements are fulfilled.

If, as a result of accidental disclosure, the trade secret becomes publicly available, trade secret protection automatically ends. The (original) owner of the trade secret may, however, claim damages from the person who has disclosed the secret without the owner's authorisation.

By contrast, if a controlled disclosure is made only to a third party who is under a duty of confidentiality, trade secret protection continues to exist. In this case, it is of essence that the obligation of secrecy is agreed upon before the actual disclosure; in the opposite case, the disclosure of the secret may be qualified as a waiver of secrecy by the owner.

1.10 Licensing

Trade secrets can be validly licensed to third parties. To ensure that the licensee uses the information disclosed within agreed limits, trade secret licence agreements should include explicit and clear non-disclosure and confidentiality clauses that continue to apply also after the agreement is terminated. Furthermore, the consequences for unauthorised disclosure as well as for all other breaches of trade secret-related obligations should be clearly stated (eg, in the form of early termination rights or contractual penalties).

It is generally understood that trade secret licence agreements are automatically terminated if the trade secret becomes publicly known (by the parties' contractual breach or otherwise). If the parties agree that the agreement will continue in spite of the trade secret becoming publicly available, this can raise competition law issues in Switzerland. Therefore, such clauses need to be drafted very carefully.

1.11 What Differentiates Trade Secrets from Other IP Rights

Formal IP rights such as patents, trade marks, designs and copyright are exclusive rights, whereas trade secrets are not. IP rights are exclusive in the sense that the right holder can exclude any third parties from making use of the right.

In contrast, legal protection of trade secrets is more limited. Trade secrets are not protected per se, but only:

- in the framework of contract law (where a contractual non-disclosure obligation is breached);
- when, in the absence of a contract, a third party obtains, discloses or uses trade secrets in a manner that constitutes unfair competition; and
- where the disclosure or use of trade secrets is specifically forbidden by criminal law.

Hence, in contrast to IP, misappropriation of trade secrets is only prohibited in certain specific circumstances and not in an absolute way.

1.12 Overlapping IP Rights

It is possible (and, in practice, frequent) that the trade secret owner asserts or licenses trade secret rights in combination with other types of intellectual property rights, in particular patents. Sometimes, the meaningful exploitation of a patent requires obtaining more information

than disclosed in the patent specification and is typically protected as a trade secret. Licence agreements granting use rights in both patents and trade secrets are sometimes referred to as “mixed licence agreements”.

1.13 Other Legal Theories

Given that trade secret protection rests on multiple legal sources in Switzerland, the trade secret owner can rely on multiple remedies depending on the facts of the individual case.

Unauthorised Access to or Exploitation of Trade Secrets

The Federal Act against Unfair Competition (UCA) lists different types of “unfair” conduct in relation to trade secrets that entail liability in tort and/or a criminal punishment. In particular, it prohibits the exploitation or use of “work results” entrusted to someone, without the permission to further use or disclose it (Article 5(a) UCA). The same Act also prohibits the exploitation or use of trade secrets obtained unlawfully (Article 6 UCA). This also includes the secondary infringement by a third party, if the third party knew or should have known that the information was received in an unlawful manner (Article 5(b) UCA).

Inducement to Disclose Trade Secrets

The UCA also sets forth that anyone who induces employees, agents or other auxiliary persons to obtain or disclose trade secrets of their employer or principal commits an act of unfair competition and is liable in tort and/or under criminal law (Article 4(c) UCA). Additionally, the UCA also sets forth that promising or accepting an undue advantage in exchange for unlawful conduct, such as the unauthorised obtention or disclosure of trade secrets, constitutes unfair competition and leads to liability in tort and/or under criminal law (private bribery, Article 4a UCA).

Remedies under Employment Law

Under Swiss employment law, employees are not allowed to exploit or reveal confidential information (including trade secrets) obtained while in the employer’s service, whether or not they obtained knowledge in the framework of their duties or by accident. As also mentioned in **1.6 Disclosure to Employees**, this duty of confidentiality continues even after the end of the employment relationship to the extent required to safeguard the employer’s legitimate interests.

Remedies under Agency Agreements

The rules on agency agreements include the agent’s obligation to act loyally towards the principal and thus prohibit any damaging acts to the detriment of the principal, including the use or disclosure of trade secrets the agent has learned of in the course of the performance of its obligations. Commercial agents are, in addition, subject to a strict duty of confidentiality.

Remedies under Corporate Law

All members of the executive organs of a company have a duty of loyalty to the company (cf Article 717 paragraph 1 and Article 803 of the Swiss Code of Obligations, CO). This also comprises the duty to keep trade secrets confidential. Furthermore, auditors are also subject to a specific duty of confidentiality, except when they are obliged by law to disclose any specific information (Article 730b paragraph 2 CO).

Remedies under Banking Legislation

The bank-client privilege (also known as Swiss banking secrecy, Article 47 of the Swiss Banking Act) sets forth that a person who discloses a secret that has been confided to them in their capacity as a bank employee, or whoever attempts to induce such a breach of professional confidentiality duty, shall be punished by imprisonment or fine.

1.14 Criminal Liability

The Swiss Criminal Code (CC) and the Federal Act against Unfair Competition both foresee criminal penalties for trade secret misappropriation. Sanctions include imprisonment and/or a fine, the seizure of manufactured goods and the publication of the judgment.

In particular, the CC foresees imprisonment for up to three years or a fine for whoever discloses a manufacturing or business secret that, according to a legal or contractual obligation, they should have kept secret, or for whoever exploits such a disclosure (Article 162 CC).

Article 273 CC provides that whoever exploits a manufacturing or business secret in order to make it available to a foreign authority or a foreign organisation or private entity, or in order to use it for their own benefit, shall be subject to imprisonment for up to three years or a fine.

Articles 320 and 321 CC provide that persons in specific positions of official authority who have official secrecy obligations, priests, attorneys-at-law, defence attorneys, notaries, auditors, doctors, dentists or pharmacists, and their auxiliary personnel, who disclose secrets entrusted to them in their respective functions, shall be subject to imprisonment for up to three years or a fine.

Article 35 of the Federal Act on Data Protection provides that whoever unlawfully makes protected personal data or personality profiles, of which they obtained knowledge while performing their professional activities, shall be subject to a fine.

The Federal Act against Unfair Competition also contains criminal provisions, related to trade secret misappropriation (Article 23 UCA); see

1.13 Other Legal Theories.

Finally, criminal sanctions are also available in the case of an unlawful disclosure of secrets by banks and their organs, employees, agents or liquidators (Article 47 Banking Act).

The trade secret owner can pursue criminal and civil remedies in parallel. The civil court is not bound by the findings of the criminal court on “fault or lack of fault and capacity or incapacity to consent”, nor by any acquittal in criminal court.

1.15 Extraterritoriality

Jurisdiction/Competence of Swiss courts

It is possible to bring claims based on trade secret misappropriation that happened in another country before a Swiss court if the Swiss court has jurisdiction for the specific case.

Switzerland is a contracting state of the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Lugano Convention”). In case of trade secret misappropriation, Swiss courts have jurisdiction under the Lugano Convention if the defendant is domiciled in Switzerland, if the infringing act has been committed on Swiss territory or if it had effects in Switzerland. Swiss courts therefore have jurisdiction if, for instance, a trade secret has been generated abroad but is exploited or used in Switzerland.

Similar principles govern the jurisdiction of Swiss courts under the Federal Private International Law Act (PILA) that applies where the Lugano Convention is not applicable.

Applicable Law

The applicable law depends on the basis of the claim that is being asserted by the trade secret owner. If the claim is based on unfair competition, Article 136 PILA provides that the governing law is the law of the state in whose market the effects of the unfair act occurred. Thus, Swiss

courts may have to apply non-Swiss law to specific disputes related to trade secret misappropriation.

2. MISAPPROPRIATION OF TRADE SECRETS

2.1 The Definition of Misappropriation

Regarding the requisite elements for a claim of trade secret misappropriation, two scenarios should be distinguished:

- cases involving an illicit exploitation of legitimately obtained trade secrets; and
- cases in which the trade secret was obtained illicitly in the first place.

Article 5 of the Federal Act against Unfair Competition is generally applicable to the first scenario. Anyone making unauthorised use of a work result (i) entrusted to them directly or (ii) obtained through an intermediary who should not have disclosed it to them commits an act of unfair competition and is liable for damages and may be subject to criminal sanctions.

The term “work product” in Article 5 UCA relates to every materialised result of intellectual effort and material expenditure. It is not relevant whether the work product is protected or protectable by formal intellectual property rights.

By contrast, Article 6 UCA is generally applicable to the second scenario. In such cases, the owner of a trade secret has to show that:

- a manufacturing or business secret is concerned (ie, demonstrate the secret character of the information);
- the respondent unlawfully gained access to the relevant information; and
- the respondent exploited or disclosed this unlawfully obtained information.

This scenario relates to clearly unlawful actions such as hacking or active deception, but also to information that a third party has passed on in breach of his or her contractual obligation of secrecy.

2.2 Employee Relationships

The increased duty of loyalty between employer and employee makes the conduct of a trade secret misappropriation claim easier in practice.

First, the employee may not disclose or exploit any business secrets learned from the employer during the employment (whether by accident or purposefully). This duty of confidentiality also continues after the end of the employment relationship to the extent required to safeguard the employer’s legitimate interests; see **3.2 Exit Interviews** (see also Article 321a paragraph 4 of the Swiss Code of Obligations, CO).

Second, the employee must immediately release to the employer everything the employee creates in the course of the employment. Even though this provision was drafted in view of tangible objects (such as manufactured furniture or harvested crop), it is understood to also include know-how, especially when it is in a tangible form such as files, plans or handbooks. The employee is not allowed to keep a copy the relevant creations (see Article 321b paragraph 2, CO).

Third, inventions and designs (whether registrable or not) made by the employee in the course of employment and in performance of the employee’s obligations automatically belong to the employer. The same is true of all rights necessary for commercialisation of software created by the employee. If such inventions are made in the course of the employment, but not in performance of the employee’s contractual obligations, they can be attracted by the employer

under certain circumstances (see Article 332 CO).

2.3 Joint Ventures

There are no explicit statutory rules on joint ventures in Switzerland. Swiss corporate law will generally classify a joint venture as a “simple partnership” according to Article 519 et seq of the Swiss Code of Obligations, irrespective of whether the joint venture is based on a written agreement or on de facto cooperation and even when the joint venture involves the creation of a new company.

The members of a simple partnership are subject to a general duty of loyalty. In particular, they have the duty to give priority to the interest of their partnership over their own interests in the event of a conflict of interest. In relation to trade secrets, this means that a party to a joint venture may not use or disclose trade secrets jointly held in the joint venture without prior authorisation by all other members of the joint venture.

2.4 Industrial Espionage

Industrial espionage constitutes a felony in Switzerland. It is defined as disclosing manufacturing or business secrets and making them available to a foreign official body, organisation or a private enterprise or their agents (Article 273 of the Criminal Code). The interests of Switzerland as a nation state do not need to be affected. It is sufficient that the act of espionage causes a disadvantage to a company based in Switzerland.

3. PREVENTING TRADE SECRET MISAPPROPRIATION

3.1 Best Practices for Safeguarding Trade Secrets

Best practices to prevent misappropriation of a trade secret vary greatly depending on the

industry, the circumstances and the category of trade secrets involved. In general, trade secret owners should take appropriate legal, technical and organisational measures to prevent misappropriation.

First, it is crucial to have appropriate non-disclosure and confidentiality agreements signed with persons with whom trade secrets are intended to be shared, before any trade secret is actually shared.

Second, state-of-the-art technical measures (firewalls, passwords, restricted access rights, storage only on secured servers, storage only in certain jurisdictions, access only on a need-to-know basis) should be taken to prevent accidental disclosure and to monitor actual access.

Third, it is important to regularly educate and train employees and contractors on the importance of keeping trade secrets confidential. It is customary to have internal guidelines on the handling of confidential information and rules on how to classify information.

In certain industries (selected chemicals, radioactive materials, etc) there are specific rules issued by regulatory bodies on the measures destined to protect plans, recipes, deliveries, etc, from accidental or criminal disclosure, the implementation of which is controlled by state organs.

3.2 Exit Interviews

As mentioned under **1.6 Disclosure to Employees**, an employee’s duty of confidentiality continues after the end of the employment relationship to the extent required to safeguard the employer’s legitimate interests.

There is no statutory obligation to conduct exit interviews, but these are increasingly common in many industries. Conducting exit interviews and

reminding departing employees of the ongoing confidentiality obligations may also be used as a further indication of the employer's subjective secrecy interest and thus help establishing the existence of trade secrets (see **1.2 What Is Protectable as a Trade Secret**).

Departing employees must, by statutory law, return any documents relating to the employer's business without keeping copies (cf Article 339a paragraph 1 CO).

Departing employees are not legally obliged to disclose their future professional activities to the former employer.

4. SAFEGUARDING AGAINST ALLEGATIONS OF TRADE SECRET MISAPPROPRIATION

4.1 Pre-existing Skills and Expertise

An employee's general knowledge and skills do not qualify as trade secrets. In disputes between employers and departing employees it may be controversial whether the employee is using actual trade secrets of a former employer or whether just acquired general industry expertise acquired by working in a given industry.

Swiss law does not recognise the doctrine of "inevitable disclosure". If an employer is of the view that it is "inevitable" that an employee will disclose certain trade secrets to a subsequent employer, the employer can make the employment agreement contingent on a post-contractual non-compete obligation (which must, however, be limited in scope, time and territory under Swiss law).

4.2 New Employees

To mitigate the risk that a new employee discloses or uses trade secrets of a former employer,

the following approaches can be used during the employee's onboarding process:

- asking the candidate about any post-termination non-compete clauses towards his former employers that could affect the employment;
- tackling the issue in the employee's new employment contract for example by including an explicit undertaking of the new employee:
 - (a) not to use or disclose trade secrets of a former employer; and
 - (b) not to bring documents from any former employer on the new employer's premises;
- having the new employee set up a list of all inventions, designs and other works that they created prior to the commencement of the new employment agreement and making sure that these will not be used when creating new inventions, designs or works.

5. TRADE SECRET LITIGATION

5.1 Prerequisites to Filing a Lawsuit

In principle, the claimant must first institute conciliatory proceedings prior to bringing a claim in court. A conciliatory hearing offers an opportunity to settle the matter at an early stage with the assistance of a conciliatory authority. It will normally take place within two to three months from the filing of a request for conciliatory proceedings. If the conciliatory proceedings fail to result in a settlement, the claimant will be granted permission to bring the action in court.

No conciliatory proceedings are needed if the respondent is domiciled abroad or their whereabouts are unknown, if the parties mutually agree to waive conciliatory proceedings and if the amount in dispute is at least CHF100,000, or if the dispute falls within the jurisdiction of the

Commercial Court (currently only four cantons have instituted Commercial Courts).

An application for a preliminary injunction must be filed directly with the competent court; conciliatory proceedings are neither necessary nor possible.

Once the statement of claim is filed (directly or after the conciliation proceedings), the claimant must pay an advance on the probable court fees, which depends on the amount in litigation. The court then serves the defendant with the statement of claim and sets a deadline for filing a written statement of defence.

The court can order a second exchange of written submissions if the circumstances require it so. The court may also hold instruction hearings at any time during the proceedings. Instruction hearings are held to discuss the matter in dispute in an informal manner, to complete the facts, to attempt to reach a settlement and to prepare for the main hearing.

There is no US-style pre-trial discovery in Switzerland. However, a precautionary taking of evidence, even before filing a lawsuit, is possible (see **5.7 Obtaining Information and Evidence**).

5.2 Limitations Period

Civil claims for damages based on tort law are subject to a limitation period of three years from the date on which the injured party became aware of the loss or damage and of the identity of the liable person, and ten years at the latest after the date on which the loss or damage occurred. However, if the claim derives from an act that also constitutes a criminal offence and criminal law foresees a longer limitation period, that longer period applies also to the civil law claim.

Claims in connection with work performed by employees for their employers – for example, claims resulting from breaches of secrecy obligations in employment contracts – become time-barred after five years (Article 128 paragraph 3 CO).

If the injured party has knowingly tolerated the misappropriation of trade secrets for a certain period of time, all monetary and non-monetary claims can become forfeited (acquiescence). There is no statutory term for acquiescence – the acceptable duration depends on the circumstances of the case.

5.3 Initiating a Lawsuit

As previously mentioned in **5.1 Prerequisites to Filing a Lawsuit**, the claimant must first institute conciliatory proceedings (*Schlichtungsverfahren*) prior to bringing a claim in court, bar some exceptions, in particular if a single cantonal instance (High Court or Commercial Court) or the Federal Patent Court has jurisdiction.

If the conciliatory proceedings fail or are not necessary, the claimant must file a statement of claim. Swiss civil proceedings are front-loaded, in that the statement of claim must contain all relevant facts and means of evidence from the outset. Referring only or mainly to evidence still to be gathered is risky and can lead to the dismissal of the claim for lack of substantiation.

5.4 Jurisdiction of the Courts

Switzerland is a federal state consisting of 26 cantons. While the CCP governs the proceedings in cantonal courts throughout Switzerland, each canton has its own court system.

Local Jurisdiction

Treaties such as the Lugano Convention (see **1.15 Extraterritoriality**), as well as national law such as the PILA and the CCP, determine the local jurisdiction for trade secret claims. Local

jurisdiction for a trade secret claim depends on various factors such as the legal nature of the claim (contractual or extra-contractual), the domicile of the parties involved, and the place where a tortious act occurred and where it deployed its effects.

Subject Matter Jurisdiction

Subject matter jurisdiction in trade secret claims depends on the legal basis of the claim that is being made:

- claims based on the Federal Act against Unfair Competition that have a value in litigation of more than CHF30,000 fall within the jurisdiction of a single cantonal instance, which is either a High Court or a Commercial Court;
- where the relevant canton has established a Commercial Court, disputes with a value of more than CHF30,000 between entities registered with the Registry of Commerce fall within the jurisdiction of this court (whatever the legal basis of the claim);
- trade secret claims that are brought together with patent-related claims (such as patent infringement, patent invalidity or patent licence claims) may be made concurrently with the patent-related claim before the Federal Patent Court;
- trade secret claims that are brought together with claims related to intellectual property rights (other than patents) may be brought together with the IP claim before the sole cantonal court as determined by cantonal law (High Court or Commercial Court);
- all other disputes fall within the jurisdiction of cantonal courts of first instance, to be determined in accordance with cantonal law.

5.5 Initial Pleading Standards

Swiss civil proceedings are “front-loaded”. In other words, a claim cannot be brought based on “information and belief”, by reference to evi-

dence that needs to be gathered yet. To the contrary, the claimant must allege all relevant facts in detail and provide all necessary evidence to the court.

In case the claimant does not have all relevant evidence, it can request precautionary taking of evidence before filing the lawsuit (see **5.7 Obtaining Information and Evidence**).

There are two basic levels of proof in Swiss civil proceedings, as follow.

- According to the standard rule of evidence, the court must be convinced from an objective point of view that a fact is established. Doubts may exist but may not be substantial. This standard of proof is usually applicable in main proceedings on the merits.
- Conversely, in preliminary injunction proceedings, the claimant only needs to make a prima facie showing that the alleged facts have happened as alleged (“more likely than not” standard).

5.6 Seizure Mechanisms

Seizures to stop misappropriation or to secure evidence can be requested under the Code of Civil Procedure, both prior to or during court proceedings.

Seizures to stop trade secret misappropriation can be requested as a preliminary injunction. The claimant needs to show:

- a prima facie case of misappropriation or imminent misappropriation of trade secrets;
- the misappropriation will lead to not easily reparable harm;
- relative urgency; and
- proportionality of the seizure to the potential harm caused by the misappropriation.

Ex parte measures (including seizures) are also available, but only upon an additional showing of a “special urgency” – which, in practice, is a high threshold.

Seizures to secure evidence are available if (i) the evidence is at risk of being destroyed or lost, or (ii) if the applicant demonstrates a legitimate interest (such as to gauge the chances of success of a lawsuit on the merits). In such cases, measures to protect trade secrets according to Article 156 CCP can be requested (see **5.8 Maintaining Secrecy while Litigating**).

5.7 Obtaining Information and Evidence

US-style discovery is not available in Switzerland. The claimant needs to gather and file all evidence that is necessary for a showing of the alleged misappropriation of trade secrets.

By exception to this principle, a party can request precautionary taking of evidence before starting proceedings on the merits. Precautionary taking of evidence can consist of inspecting a machine, a product or sometimes documents that are under the control of the opposing party. Precautionary taking of evidence is ordered by the court and performed in the presence of members of the court.

Precautionary taking of evidence is available if the applicant shows credibly either that the evidence is at risk or that it has a legitimate interest in obtaining evidence. In particular, determining whether proceedings on the merits would have good chances of success can qualify as “legitimate interest” and justify precautionary taking of evidence. In this case, the applicant has to show credibly that all elements of the misappropriation of a trade secret are fulfilled, but for the one element that may be proven by the precautionary taking of evidence.

5.8 Maintaining Secrecy while Litigating Principle: Briefs and Documents Are Not on Public Record

In Switzerland, court decisions are publicly available, though they are often published in an anonymised version. However, the parties’ briefs and means of evidence are not a matter of public record and cannot be accessed by persons who are not parties to the proceedings. Nonetheless, in the absence of a court order, both parties are free to publish and publicly comment on briefs and means of evidence filed by the other party.

Protection of Trade Secrets in Proceedings by Appropriate Court Orders

The Code of Civil Procedure (CCP), the Code of Criminal Procedure (CCrP) and the Code of Administrative Procedure (CCAP) all contain legal provisions ensuring confidential treatment of trade secrets by courts and thus maintaining the secrecy while the case is pending (cf Article 156 CCP, Article 70 and 101 CCrP and Article 26 CCAP).

Article 156 CCP, for example, states that if the taking of evidence endangers the interests of a party or third parties, such as in particular their business secrets, the court shall take the “necessary measures” to protect those secrets. The claimant can already request such protection simultaneously with the filing of a complaint. On this basis, Swiss courts may assess on a case-by-case basis the appropriate measures to be taken.

Possible measures to protect trade secrets include the filing of redacted versions of documents, an order against the opposing party against copying or disclosure of documents and a request to publish the decision by redacting the relevant trade secrets.

Importantly, the Federal Supreme Court recently made it clear that court orders regarding the pro-

tection of trade secrets in the proceedings can only last for the duration of the proceedings. If a party needs further protection after the proceedings have ended, additional measures (typically by filing a separate request with the court) are needed. In practice, trade secrets can be reasonably protected after the end of the proceedings by having the opposing party ordered to destroy any copies of the relevant documents.

Furthermore, the court may also order that hearings will not be public or restricted to a category of people (typically, the press), along with an order not to disclose certain information to the public.

Protection of Trade Secrets versus Right to Be Heard (Due Process)

Providing only redacted versions of documents to the opposing party while disclosing the unredacted document to the court is generally considered in breach of the opposing party's constitutional right to be heard and will in principle not be accepted. More generally, the protection of confidentiality in proceedings must always be balanced against an opposing party's right to be heard. The opposing party must in principle have access to all documents the court has access to in order to reasonably defend itself.

Professional Secrecy

A party may refuse to co-operate in the disclosure of evidence entirely, if a protected professional secret is concerned (eg, attorney-client privilege). Other persons entrusted with legally protected secrets may also refuse to co-operate, if they demonstrate that the interest in preserving the secret outweighs the interest in establishing the truth (Article 163 CCP).

5.9 Defending against Allegations of Misappropriation

Defences in trade secret litigation may include the following arguments by the alleged infringer:

- the relevant information is no longer confidential or has never been confidential (lack of secrecy);
- the trade secret owner has not taken appropriate measures to ensure secrecy and thus does not have an interest in maintaining secrecy (lack of subjective interest in secrecy);
- the trade secret was obtained lawfully from a third party;
- the alleged infringer understood in good faith that the disclosure of the trade secret was made with the authorisation of the trade secret owner;
- the alleged infringer has discovered or developed the trade secret independently;
- the relevant information does not constitute a trade secret but rather general industry expertise or knowledge;
- the disclosure of the trade secret was authorised or required by law.

Generally, there is no “unclean hands” defence in Swiss law. In other words, the alleged infringer cannot point to the trade secret owner's own misappropriation of (other) third party trade secrets. Nonetheless, if the alleged infringer can show that the trade secret owner itself obtained access to the same trade secret unlawfully, this would likely lead to the loss of an objective interest in secrecy and could therefore be used as a defence.

5.10 Dispositive Motions

Swiss civil procedure law provides only limited possibilities to request a court to dispose of a claim at an early stage of the proceedings. It is possible to request the split of the main proceedings – eg, by requesting that the court limit the proceedings to one or a few issues only – if these can lead to a swift conclusion of the case. Typically, such issues include jurisdiction or the statute of limitations. In trade secret cases, the alleged infringer may request that the proceed-

ings be limited (eg, to the question of whether the relevant information is secret at all). However, the court has a large discretion in granting or refusing such requests and requests based on substantive law (as opposed to, for example, jurisdiction) are not often granted.

Nonetheless, if the plaintiff is claiming financial compensation for trade secret misappropriation, the proceedings would typically be first limited to the question of whether or not there has been misappropriation. If this is answered in the affirmative, the question of quantum will be discussed in the second phase of the proceedings only.

5.11 Cost of Litigation

Swiss law distinguishes between court costs (cf Article 95 paragraph 2 CCP) and party costs (in particular, attorneys' fees – cf Article 95 paragraph 3 CCP).

The general principle of costs in civil proceedings is “loser pays” (cf Article 106 CCP). The losing party therefore needs to pay the court fees and compensate the winning party for its attorneys' fees. If neither party has fully prevailed, the costs of the proceedings are apportioned according to the outcome of the proceedings.

An exception to this general “loser pays” rule applies in employment and rental disputes where each party bears its own legal costs. However, court fees for these proceedings are generally low.

The fees for cantonal courts are set out in cantonal tariffs and depend on the value in litigation and the complexity of the case, the number of submissions, the duration of the proceedings and other factors. The court generally requests an advance payment from the plaintiff up to the amount of the presumed court costs (Article 98 CCP).

Court-ordered compensation for attorneys' fees also follows a statutory tariff and depends primarily on the amount in dispute. Therefore, the court-ordered compensation for attorneys' fees will often not cover the actual legal fees incurred by the prevailing party.

Under certain conditions (cf Article 99 CCP), the plaintiff must also provide security for the defendant's compensation at the latter's request.

Pure contingency fee arrangements – ie, where the attorney gets a percentage of the outcome of the case but waives all fees in case of a loss – are explicitly prohibited under Swiss law. Conversely, arrangements pursuant to which the client pays a reduced fee and, in case of a successful outcome, the attorney gets a success fee depending on the amount awarded, are permissible.

There are a few litigation financing providers in Switzerland. Litigation financing is a recent and still marginal development in Switzerland. This is due to the size of the Swiss market and the fact that it is often difficult to obtain high amounts of damages due to the strict test of actual loss applied by Swiss courts.

The Swiss Constitution provides that any person who does not have sufficient means has the right to free legal advice and representation unless their case appears devoid of chances of success (“legal aid”). Legal aid comprises a dispensation from the obligation to advance costs and to provide security to the other party, a dispensation from having to bear court costs and, if necessary, the payment of representation fees. The threshold to obtain legal aid is high and in principle reserved to natural persons. Companies can only benefit from legal aid in exceptional cases.

The actual costs of court proceedings is difficult to predict and heavily depends on the complex-

ity of the case. Simple employment law cases can be litigated for a limited amount, while complex cases with extensive evidence can generate six-figure costs for both parties.

6. TRIAL

6.1 Bench or Jury Trial

All trials in Switzerland are decided by a judge or a panel of judges. There are no juries in civil or criminal cases.

6.2 Trial Process

As previously mentioned under **5.1 Prerequisites to Filing a Lawsuit**, civil proceedings are usually initiated by a detailed statement of claim, which includes supporting documentary evidence and offers of further evidence (such as witnesses, court-appointed experts, etc). There are generally two exchanges of briefs (one in preliminary injunction proceedings) and proceedings are largely based on written evidence.

Live witnesses and experts can be heard by the court. Instruction hearings can be held at any time during the proceedings, in which the matter in dispute is discussed in an informal manner in order to complete the facts, to attempt to reach a settlement and to prepare for the main hearing.

Proceedings are generally concluded by a main hearing in which the parties present oral arguments. All facts and evidence must be set out in the written submissions; new facts or new evidence can in principle not be introduced at the main hearing, bar in a few exceptional cases.

Typically, trials in the courts of first instance take between one and two years.

In complex cases, and in cases where witnesses or expert witnesses are heard, the duration of the proceedings can be much longer.

Preliminary injunction proceedings typically conclude within two to six months before the first instance court.

6.3 Use of Expert Witnesses

Swiss civil procedure law distinguishes between party-retained experts and court experts.

Party Experts

Reports or testimony by party-retained experts is not formally considered a means of evidence, but merely allegations of a party. Nonetheless, if such reports or testimonies are convincing and the expert has a degree of independence vis-à-vis the relevant party, they can be taken into account in the decision.

Court Experts

Court experts are chosen and instructed directly by the court. The parties must be heard and can comment on the choice of the expert and the questions put to the expert. Court experts are independent from the parties and it would be inappropriate for parties to contact them for preparing the report or the testimony. Court expert reports and testimony constitute a formal means of evidence.

Expert testimony is only accepted with regard to factual, not legal issues. By exception to this principle, if there is a question of non-Swiss law at stake in the proceedings, legal experts from the relevant jurisdiction can be used as party or as court experts.

If one or more judges of the court has expert knowledge in the relevant area, the court can also rely on the relevant judge. This is generally the case before the Federal Patent Court that has a vast number of technical judges in various areas of science and engineering.

The costs of expert testimony vary greatly depending on the arrangements and hourly rates of the relevant experts.

7. REMEDIES

7.1 Preliminary Injunctive Relief

Preliminary injunctive relief is available. The claimant needs to show:

- a prima facie case of misappropriation or imminent misappropriation of trade secrets;
- that the misappropriation will lead to not easily reparable harm;
- relative urgency; and
- proportionality of the injunction to the potential harm caused by the misappropriation.

Ex parte measures are also available, but only upon an additional showing of a “special urgency” – which, in practice, is a high threshold.

Preliminary injunctive relief may not prejudice the decision on the merits. As a result, irreversible measures (eg, the destruction of products) are in principle not available as a preliminary injunction.

If the measures may cause damage to the opposing party, the court can require the applicant to provide appropriate security. The amount of the security is determined in the individual case and must be proportionate to the potential harm caused by the preliminary injunction.

If the court grants preliminary injunctions, it sets a deadline (typically two months) to the plaintiff to file a lawsuit in main proceedings. Failing this, the preliminary injunction automatically lapses.

Preliminary measures may be modified or revoked at any time and they lapse at the latest with the final decision on the merits.

7.2 Measures of Damages

In the case of trade secret misappropriation, the plaintiff can request, alternatively:

(1) compensation for the loss suffered by the plaintiff as a result of the misappropriation (damages, Article 41 CO);

(2) payment of the unjust enrichment accrued with the infringer as a result of the misappropriation (Article 62 CO);

(3) surrender of the profits made by the infringer through the use/distribution/sale of the infringing products (disgorgement of profits, Article 423 CO).

When choosing option (1), monetary remedies in trade secret cases are assessed on the basis that the plaintiff should be placed in the position where they would be in if no infringement had occurred. Option (2) is considered to be the basis to claim the hypothetical licence fee that the infringer should have paid if they had obtained a licence for the relevant use. For option (3) the net profit made by the infringer serves as a basis for calculating the claim size.

Swiss law is very strict when it comes to the proof of damages (option 1). The trade secret owner must provide clear and convincing evidence of the loss. Damages claims often fail because the court considers that the plaintiff has not sufficiently established its loss.

Swiss law does not provide for punitive damages. The Federal Supreme Court considers that punitive damages are contrary to Swiss public order. Foreign decisions related to punitive damages cannot be enforced in Switzerland.

7.3 Permanent Injunction

Permanent injunctions are available in Switzerland and a permanent injunction is (to date) con-

sidered to being granted automatically upon a finding of trade secret misappropriation, without further balancing of the parties' interest. Permanent injunctions in trade secret cases are generally not limited in time.

Some courts, in particular the Federal Patent Court, order the defendant to recall the infringing products from the market.

A former employee can be enjoined from using or disclosing specific trade secrets in a new position, or to comply with a (valid) non-compete undertaking. An order that a former employee shall not work for a competitor would likely be considered disproportionate, except in case there is an explicit post-termination non-compete clause in the original employment agreement.

7.4 Attorneys' Fees

See **5.11 Cost of Litigation**.

7.5 Costs

See **5.11 Cost of Litigation**.

8. APPEAL

8.1 Appellate Procedure

The process for appealing a decision in a trade secret case depends on which court issued the decision in the first instance (see **5.4 Jurisdiction of the Courts**). The appeal process thus differs depending on the court where the case was filed.

- Decisions by a court acting as a sole cantonal instance (Commercial Court or High Court) or the Federal Patent Court may only be appealed to the Swiss Federal Supreme Court.
- By contrast, decisions rendered by a lower cantonal instance such as a regional labour

court or a district court can be first appealed to a higher cantonal instance (High Court).

The second-instance decision may then be appealed to the Federal Supreme Court.

- In both cases, the appeal is available to the losing party.

Most trade secret cases based on the Federal Act against Unfair Competition will be tried before a single cantonal instance – ie, a High Court or a Commercial Court (the first option above). Appeal proceedings to the Federal Supreme Court typically last between six and nine months.

For disputes that are subject to two cantonal instances (the second option above), the appeal to the High Court typically lasts between one and two years. The subsequent appeal to the Federal Supreme Court typically lasts between six and nine months.

Appeal options against preliminary injunction decisions are generally very limited.

The deadline for filing an appeal or a complaint is generally 30 days (in preliminary injunction proceedings, the deadline is ten days before the High Court and 30 days before the Federal Supreme Court). Within this deadline, the appellant must file a full appeal brief with all allegations and means of evidence (as opposed to a short notice of appeal).

Court costs of an appeal depend on the amount in dispute and can range from a few thousand to tens of thousands of Swiss francs (CHF). The losing party has to bear the court costs and has to pay to the winning party a specific, limited amount for the latter's party costs. Party costs awarded also depend on the amount in dispute and are usually higher than the court costs.

8.2 Factual or Legal Review

The cantonal High Court may hold a live hearing, though appeal hearings are rare. In general, the appeal procedure is conducted in writing and the decision based on written evidence.

While the Federal Supreme Court can also conduct hearings, this hardly ever happens in practice. The proceedings before the Federal Supreme Court are almost always exclusively in writing.

Whether the appeal court reviews only legal or also factual issues depends on the remedy.

- An appeal before the higher cantonal court constitutes a full review *o*. New facts and new evidence are heard, if they have been submitted immediately and could not be submitted earlier despite reasonable diligence (Article 317 CCP).
- In the context of an appeal to the Federal Supreme Court, only legal questions may be reviewed in full (Article 95 Act on the Federal Supreme Court), while the establishment of the facts may be challenged only if they are manifestly incorrect or are base. New facts and evidence may only be submitted to the extent that the decision of the lower court gave rise to it (Article 99 Act on the Federal Supreme Court).

9. CRIMINAL OFFENCES

9.1 Prosecution Process, Penalties and Defences

Process for Initiating a Criminal Prosecution for Trade Secret Theft

Depending on whether the alleged offence is an *ex officio* offence or is subject to a criminal complaint, criminal proceedings in Switzerland are either automatically initiated by the state/

ex officio or require a complaint by the person whose legal interests are affected.

The criminal complaint must be filed within three months of the knowledge of the offence and of the offender. Criminal proceedings are conducted by police and the public prosecutors and the injured party has only very limited control of the proceedings.

Potential Defences Available for Criminal Charges for a Trade Secret Theft

For criminal proceedings, the general grounds of criminal justification such as consent, state of emergency and self-defence, as well as misconception, apply. In addition, there are special grounds for justification for persons who are subject to professional secrecy, such as reporting obligations.

Potential Criminal Penalties for Trade Secret Theft

See **1.14 Criminal Liability**.

10. ALTERNATIVE DISPUTE RESOLUTION (ADR)

10.1 Dispute Resolution Mechanisms

Arbitration

Switzerland has always played an important role in international arbitration. Geneva and Zurich are among the most frequently used seats of arbitration worldwide. The fact that the parties can appoint the arbitrators is particularly attractive in cases involving trade secrets related to complex technologies, or cases requiring decision-makers with expertise in a particular industry.

Under Swiss law, any claim of a pecuniary nature may be brought before an arbitral tribunal, including claims relating to trade secrets (subject to exceptions for certain employment disputes).

Among the main advantages of arbitration are the confidential nature of the proceedings and the expertise of the arbitrators.

The parties can either establish their rules of procedure themselves, refer to the rules of procedure of an arbitration body or submit the proceedings to a procedural law of their choice (typically the ICC Rules, the Swiss Rules of International Arbitration, the WIPO Rules or the UNCITRAL Rules).

Most arbitration rules allow the arbitral tribunal to issue preliminary injunctions, and some even provide for emergency arbitration proceedings prior to the constitution of the arbitral tribunal. Under Swiss law, the state courts still have parallel jurisdiction to issuing preliminary injunctions, unless the parties have agreed otherwise. State courts may also assist in the enforcement of an arbitral award or in the taking of evidence.

There are only very limited grounds to challenge an arbitral award (such as due process violations or lack of jurisdiction) in Switzerland. Challenges must be made to the Federal Supreme Court; in other words there is only one instance of appeal against an arbitral award.

A Swiss arbitral award is enforceable in Switzerland in the same way as a Swiss court decision. An award of an arbitral tribunal that has its seat overseas can be enforced in Switzerland pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Swiss legislation applies the New York Convention regardless of whether or not the country that is the seat of the arbitration is a party to the convention.

Mediation

In recent years mediation is increasingly used also in Switzerland. Because of its speed and efficiency, the cost of mediation is only a fraction of the more costly litigation or arbitration. Mediation attempts to preserve the relationship between the parties and thus often helps to maintain ongoing relationships.

Conciliation

As mentioned in **5.1 Prerequisites to Filing a Lawsuit**, the Code of Civil Procedure requires a mandatory conciliation hearing before any claim can be filed at court, except if the claim must be filed with the single cantonal instance or the Federal Patent Court.

In addition, once proceedings are pending before a court, the Code of Civil Procedure allows the judge to instigate settlement discussions. A judge can propose settlement or the parties can ask the judge to suspend proceedings while they negotiate. Special conciliation procedures are in place to handle employment disputes.

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The logo graphic consists of a dark blue rectangular background. A thin red horizontal line is positioned above the text. The text "LENZ & STAEHELIN" is written in a white, all-caps, sans-serif font, centered horizontally within the rectangle.

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Trends and Developments

Contributed by:

*Thierry Calame and Peter Ling
Lenz & Staehelin see p.26*

What Happens in Court Stays in Court – or Does It? Trade Secret Protection in Swiss Proceedings

Introduction

As a small jurisdiction with world-class universities and important private research and development activities, Switzerland has always provided a high level of trade secret protection. Although Switzerland is not a member state of the EU and the EU Trade Secret Directive is thus not applicable, and although the provisions on the protection of trade secrets are scattered among several statutes, the legal certainty and predictability of substantive trade secret protection is reasonably high.

The picture is more mixed when it comes to protecting trade secrets in litigation. The applicable rules of the Code of Civil Procedure are rather vague. The relevant provision merely sets forth that the court “shall take appropriate measures” if the taking of evidence endangers the “legitimate interests of any party or of third parties, such as trade secrets”. Until recently, there has been limited case law with regard to specific protective measures available to litigants. This issue does not only relate to litigation about trade secrets, but also to litigation related to other areas of law (in particular patent, licensing and general contract litigation) where parties need to disclose trade secrets to the court as evidence in order to prove their allegations of fact.

Protecting trade secrets in court litigation is by definition a balancing act. On the one hand, the interest of the trade secret owner must be protected against unauthorised use or misappropriation of the relevant confidential information. On the other hand, the right to a fair trial means that

all evidence must be disclosed to the opposing party without restriction and in the same way as it is disclosed to the court. In addition, parties have a fundamental right to a public hearing, as set out in Article 6(1) of the European Convention on Human Rights.

Several recent court decisions have shed light on specific means of protecting trade secrets before civil courts and administrative bodies. These decisions have specified some available options not explicitly mentioned in the statute, but have also shown the limits and some of the pitfalls of protecting trade secrets in proceedings.

Federal Supreme Court: strong protection of trade secrets in court proceedings – but only until the proceedings are closed

In a decision published in late 2021 (Case No 4A_58/2021), the Federal Supreme Court ruled that the Code of Civil Procedure provides broad discretion to the judge to tailor virtually any protective measure to protect confidential information, provided the measures are appropriate, necessary and proportionate in view of the circumstances. Upon request by the disclosing party, the court can, in particular, order the other party to keep disclosures confidential under the threat of criminal prosecution in case of non-compliance.

Such measures are in principle reserved to protect the confidentiality of means of evidence (documents, but also machines or products filed for inspection), whereas the allegations of a party in its briefs do not constitute protectable information. By exception to this principle, quotes (whether verbatim or indirect) from docu-

mentary evidence in the briefs can also constitute protectable confidential information.

In an important caveat to this welcome clarification, the Federal Supreme Court added that any measure ordered by the court will only last for the duration of the relevant proceedings. If a party wants to prevent its opponent from disclosing confidential information after the proceedings end, it needs to initiate separate court proceedings to this effect.

In practice, this is a heavy burden on the trade secret owner, both in terms of time and costs. Trade secret owners will generally have an interest to protect their confidential information after the proceedings are closed, so this issue will arise in most court cases. In the future, this decision may thus have a chilling effect on the disclosure of trade secrets in court litigation. Parties will no doubt often prefer not using confidential information at all or filing redacted versions of documents instead of assuming the burden of starting separate court proceedings (sometimes with an uncertain outcome) to protect their valuable confidential information.

Federal Patent Court: no protection of information that is not confidential or where the party lacks any interest in secrecy

In a recent decision, the Federal Patent Court dealt with a request related to the protection of a written statement made by the employee of a party and related to technical information on the implementation of a software solution. The defendant in this patent infringement case asked the court to order the claimant not to copy or disseminate the written statement to protect its trade secrets. In addition, the defendant alleged that the protection of personality rights of the relevant employee also command the imposition of a non-disclosure order upon the other party.

The Federal Patent Court considered the relevant document in detail and stated that the technical information it contained was obvious for any user of the relevant application. With regard to the personality rights of the employee, it stated that the employee is a named inventor in several patent applications of the defendant and has a publicly accessible social media profile where their position within the company is stated. In view of these circumstances, the Federal Patent Court considered that the defendant had no interest in an order to maintain the document's confidentiality and rejected the relevant request.

Zurich Administrative Court: accidental disclosure of confidential information in administrative proceedings can be corrected

A decision related to the protection of trade secret before administrative bodies was recently published by the Zurich Administrative Court. The case related to the accidental disclosure of confidential information by a Swiss foundation in a filing with the Commercial Register. Instead of filing redacted versions of meeting minutes, the foundation mistakenly filed complete documents, including business secrets and confidential information related to third parties. These documents are publicly available from the Commercial Register upon a reasoned request by third parties. The foundation requested that the filed meeting minutes be replaced by a partially redacted version of the same document. The Commercial Register rejected the request for lack of a legal basis and the foundation appealed to the Administrative Court.

The Administrative Court considered that while there is no explicit legal basis to withdraw documents already filed with the Commercial Register, the foundation could avail itself of the constitutional right to informational self-determination. Given that the unredacted minutes included personal data of third parties and business secrets of the foundation, this fundamental right is

affected – it is even heavily affected in the case at hand.

The Administrative Court considered that there was no legal basis for denying the (subsequent) redaction or deletion of personal data and no interest of the public in having access to content that is not relevant for the Commercial Register. The Commercial Register's refusal to remove the unredacted documents was also considered disproportionate. The Court thus concluded that the private interests of the foundation in subsequent redaction of its documents are higher than the public interest in the immutability of documents filed with the Commercial Register. It therefore ordered the Commercial Register to remove the unredacted documents from the public files and replace them with the partially redacted copies provided by the foundation.

Conclusion

The above outlined decisions show that, while the statutory basis for the protection of trade secrets in civil and administrative proceedings may seem fragmented and vague, courts have a broad discretion to issue measures that are tailor-made for a specific case. As a result, litigants can rely on a strong protection of their confidential information in civil and administrative proceedings.

At the same time, the broad discretion is also used by courts to second-guess the litigants' interest in confidentiality in each individual case. Parties in litigation must argue in detail why specific information should be considered confidential and why they have an actual interest in keeping it that way. Importantly, parties must realise that any protective measure obtained in court lasts only until the closure of the proceedings and further measures (in particular, a separate lawsuit related to the confidentiality issue only) may be necessary to ensure that what happens in the proceedings will really stay in the proceedings.

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