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## VALUABLE KNOW-HOW IN EU SPOTLIGHT

One in five businesses falls prey to trade secrets theft, while many never even identify or secure their confidential information. Practically every business entity has proprietary data, technology or formulae that hold a substantial market value and drive the enterprise's competitive edge. In short, protecting your trade secrets is important, regardless of the size of your firm. It is important for SMEs (one very well-known trade secret litigation case in Poland involved recipes for vegetable salads). Business secret rights do not need registration, or require the payment of any official fees. It is sufficient to identify such information, then record it and use technical measures and confidentiality agreements to protect it against disclosure to third parties.

On April 14, 2016, the European Parliament adopted a proposal for a "Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure" ("Trade Secrets Directive"). The directive is designed to harmonise the level of know-how protection across Member States. This proposal marks the end of legislative efforts to draft a regulation that would enhance know-how protection while preventing attempts to restrict employees from using their skills in their subsequent employment, or to limit access to information about infringements of law.

According to the directive, courts would be authorized to direct that infringing products are not manufactured or sold, or must be destroyed. This resolves the issue of whether the court can only go as far as prohibiting the use of trade secrets, or may also order measures which directly affect the goods manufactured using the infringed know-how. Such a claim increases the chance that the unlawfully acquired information will not be re-used by the infringer.

Polish lawmakers can find it a challenge to implement additional regulations on damages for unlawful acquisition, use, or disclosure of secrets. The EU law requires that the "quantum" of damages should also take into account the moral implications of the trade secrets theft. The courts will be able to impose lump-sum fines, calculated on the basis of potential royalties fees, for use of the infringed trade secrets.

**ACCORDING TO THE DIRECTIVE, COURTS WOULD BE AUTHORIZED TO DIRECT THAT INFRINGING PRODUCTS ARE NOT MANUFACTURED OR SOLD, OR MUST BE DESTROYED. THIS RESOLVES THE ISSUE OF WHETHER THE COURT CAN ONLY GO AS FAR AS PROHIBITING THE USE OF TRADE SECRETS, OR MAY ALSO ORDER MEASURES WHICH DIRECTLY AFFECT THE GOODS MANUFACTURED USING THE INFRINGED KNOW-HOW**

The directive offers a range of welcome solutions that protect trade secrets during infringement litigation. Many businesses give up on enforcing their know-how rights in court, fearing that they may have to disclose their secrets for evidentiary purposes. This issue turns out to be another challenge for Polish legislature.

The Directive is certainly good news for companies wishing to protect their know-how within the EU. Member States have 24 months to implement it. ♦