

New Interpretation of 'Trade Secrets' in Public Procurement

In recent years, Hungarian courts and regulators have taken a variety of different approaches in an attempt to strike a balance between ensuring the confidentiality of the information provided by tenderers in contract award procedures on the one hand and transparency on the other. For many years, tenderers were able to request that contracting authorities treat most of the information they disclose confidentially. Recently, under the current Public Procurement Act¹, the pendulum has swung in the opposite direction and the scope of information that can be protected as a trade secret has been narrowed.

Therefore, the latest decision of the European Court of Justice (hereinafter: Court) in the *Antea Polska* case (C-54/21) could prompt a significant change in the interpretation of public procurement rules and practice.

The main findings in *Antea Polska*

A Polish contracting authority launched a public procurement procedure for the purposes of developing projects relating to environmental management. The contract was awarded on the basis of price, project development design and a description of how the contract would be performed. That description included commercially sensitive information, such as lists detailing the services previously provided, information regarding third parties and subcontractors involved.

The question before the Court was whether this kind of information could be treated confidentially

in the procedure or whether it had to be disclosed to other tenderers.

The Court delivered a landmark decision with respect to the interpretation of 'trade secret' under public procurement law and confirmed that the scope of confidentiality set out in Directive 2014/24/EU is broader than the protection covering trade secrets alone. However, information may only be treated confidentially if it has commercial value outside the scope of the public contract in question and if its disclosure could risk undermining legitimate commercial concerns or fair competition.

The Court also ruled that although the protection of confidential information is broader than the definition of 'trade secret' under Directive (EU) 2016/943, contracting authorities must, to the extent possible, provide access to the essential content of information that is treated confidentially.

In practice, this could mean that contracting authorities may disclose a summary of certain aspects of a bid without disclosing its confidential parts specifically, or that the winning tenderer must provide a non-confidential version of the relevant documents. Eventually, information about the successful bid, including its confidential parts, will have to be disclosed to unsuccessful tenderers in sufficient detail so as to allow them to exercise their right to an effective remedy.

Potential impact on Hungarian public procurement rules

The findings of the Court in *Antea Polska* may have an impact on Hungarian legal practice. Under the Public Procurement Act currently in force, an economic operator may request that information that qualifies as a 'trade secret'² be treated confidentially if the disclosure of such information would cause it disproportionate harm.

¹ Article 44 of Act CXLIII of 2015 on Public Procurement

² The definition of 'trade secret' in Hungarian law corresponds essentially to the concept of the trade secret in Article 2 (1) of Directive 2016/943.

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Thus, the law protects information that qualifies as a 'trade secret'. In addition, regulatory practice and case law have extended this protection to other commercially sensitive information where it can be demonstrated that the disclosure of such information would cause disproportionate harm to the relevant tenderer. This practice appears to be in line with the findings in *Antea Polska*.

On the other hand, pursuant to *Antea Polska*, any information treated confidentially will have to be demonstrated to have commercial value outside the scope of the relevant public procurement procedure. The potential harm suffered by the owner of the information in the given procedure (e.g. disclosure of the subcontractor chain) most likely will not be enough to warrant labelling the information as a 'trade secret'. This novel reasoning may necessitate changes in practice, burdening both tenderers who request such protection and contracting authorities, who will have to evaluate whether a tenderer's reasoning is legitimate or not.

Furthermore, under Hungarian public procurement law, a document treated as a 'trade

secret' cannot be disclosed to other tenderers. This rule will presumably change as a result of *Antea Polska*, and contracting authorities will probably have to disclose a summary of documents that contain a 'trade secret' without disclosing any confidential information. Again, it is anticipated that this approach may trigger a modification of the regulations to define the steps that have to be taken in order to achieve compliance with these disclosure obligations.

Authors: Eszter Á. Kontor and Kitti Koncsik

For more information:

Dr. Eszter Á. Kontor LL.M., M.Sc.
Of Counsel
eszter.kontor@cerhahempel.hu
Tel: +36 1 457 80 40

Dr. Kitti Koncsik LL.M.
Associate
kitti.koncsik@cerhahempel.hu
Tel: +36 1 457 80 40