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IS YOUR BUSINESS INFORMATION PROTECTED?

Nowadays almost all companies are well aware that the information related to their business (such as business plans, lists of clients and partners, project documentation, business policies and procedures) is among their most important assets. However, situations in which this asset is rather neglected can still be seen. There are various reasons for this; to name a few: lack of understanding of what information the company possesses and failure to take measures to protect it.

Generally, a company can protect its information as confidential and/or as a trade secret. Although these terms are often used interchangeably and there is a substantial overlap between them, they are in fact different concepts governed by different statutory regulations. Therefore, in order to protect its business information, a company must first determine the type of information it possesses. However, sometimes this turns out to be quite difficult.

With a view to this, below we touch upon the most important characteristics of confidential information and trade secrets, as well as the means for their protection. At the same time, we try to outline the main differences in order to facilitate readers' better understanding of the different concepts.

Confidential information

Broadly speaking, confidential information has a wider scope than a trade secret. All trade secrets constitute confidential information, however not all confidential information qualifies as a trade secret. There is no strict definition in Bulgarian legislation on what constitutes confidential information. Such information could be a company's financial background, business documentation, executed agreements, policies and procedures, etc., which are generally not known by third parties.

Thus, it is rather up to the company to define the specific information it considers confidential. There is no requirement that the information has some commercial value to the company and the company does not need to prove any interest in keeping it confidential. The main element is for this information not to be widely known.

Basically, in order to protect its confidential information, a company needs to include specific clauses, for example, in its contracts with employees and business partners. These clauses shall define the information the company considers as confidential and based on the court practice must be rather detailed in scope (exhaustively, to the extent practically possible). Further, respective obligations with regard to the confidential information (e.g., not to acquire, use or disclose the information), as well as sanctions for breach of said obligations (e.g., termination of the contract, penalties) if defined by the company could facilitate potential claims. Penalties, however, need to be carefully considered, as in some cases (e.g., employment relationships) their validity and enforceability is questionable.

Confidentiality clauses could be included in various documents depending on the subjects to which they apply, for example, employment contracts, internal regulations/orders, service agreements, non-disclosure agreements. In any event, the respective document must be brought to the knowledge of the respective employee/business partner.

By ensuring the above, the company may have better chances for a successful court claim against the party at fault. If this party is an employee, a disciplinary sanction could be imposed as well, including termination of the employment relationship.

Trade secrets

As previously written, trade secrets and confidential information are not the same concepts, however, there are many similarities between them.

Until quite recently, trade secrets were treated rather differently across the EU (e.g., there were Member State having no legal definition of trade secrets) and they did not enjoy the same level of protection in all Member States. These differences caused difficulties and uncertainties for companies carrying our business in more than one Member State and investing in their intellectual capital, including trade secrets. For that reason, and in order to harmonize the legislation across the internal market, a Directive related to trade secrets[1] was adopted at the EU level. The said Directive was then implemented into Bulgarian legislation through the Protection of Trade Secrets Act[2] ("PTSA").

The concept of trade secrets is not new for Bulgarian law. Before the recent adoption of the PTSA the concept of trade secrets was regulated in different sectors, e.g., commercial relations, as well as in the context of competition matters. Thus far, protection of trade secrets was sought mainly on the basis of the Protection of Competition Act ("PCA"). The PTSA, however, expands the protection of trade secrets to situations in which the infringer is not a competitor of the trade secret holder. Following the adoption of the PTSA, the already existing regimes will continue to apply along with the new regime, meaning certain information may fall under the scope of both the PCA and the PTSA, where the PCA applies to competitive relationships only.

As mentioned, trade secrets and the wider concept of confidential information have overlapping characteristics and thus the notes on confidential information above apply to a great extent to trade secrets, as well. Therefore, below, we have provided some differences of trade secrets under the PCA and the PTSA as opposed to confidential information.

Trade secrets under PCA

Unlike confidential information, trade secrets under the PCA shall in any case be related to the business of the company, and keeping it a secret shall be in the company's interest. In addition, it seems that additional measures are needed to preserve the secrecy of the information other than simply including clauses in contracts/acts. Such measures may include the prohibition of external/internal communication on specified topics, education/training of employees/consultants/vendors (if applicable), adoption and regular review of internal policies, limitation of physical and online access to databases (and premises), etc. As we see it, although such measures are only required to be implemented with respect to trade secrets, they may also be applied for protection of confidential information.

[1] Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

[2] Protection of Trade Secrets Act, promulgated, SG No. 28/5.04.2019.

In case of a breach under the PCA, administrative sanction may be imposed by the Commission for Protection of Competition. The company can further claim damages in court (if applicable).

Trade secrets under PTSA

On the other hand, the PTSA introduces some new requirements with regard to trade secrets.

The information protected under the PTSA must have commercial value and measures must be taken by the person controlling the information to keep it a secret.

Such information might be know-how, technical and production-related information, manufacturing process, etc. Typically, in a business environment, certain information is valued because keeping it a secret gives advantage to its owner over third parties. Unlawful acquisition, use or disclosure with respect to the information is likely to harm the interests of the person who is in control of that information (e.g., to undermine strategic, technical, business or scientific positions on the market). In this sense, trade secrets may have real commercial value or potentially be profitable in the future. The concept of trade secret excludes trivial information or commonly known facts, as well as experience and skills gained by employees in the course of their work.

As the information must be defined, a company shall first draw the line between all of the information inherent to its business and the data/information it considers to be a trade secret. Unlike the wider concept of confidential information, the PTSA explicitly requires for measures to be adopted to keep the information in secrecy as a means of proving the information has the quality of a trade secret. This is essential for the outcome of hypothetical court proceedings. The law does not provide for a list of such measures. In our view, it could be assumed that the measures indicated above (i.e., when discussing the trade secrets regime under the PCA) could be applied here, as well.

Conclusion

The protection of certain business information requires such information (regardless of whether it is a trade secret or confidential information) to be identified clearly by its owner out of the total volume of data/information the company possesses. Drawing the line between these categories, however, seems not so simple. In any case, in order to preserve the secrecy of the information certain actions are required to be taken. These actions should be mindfully considered by the interested persons in the light of the different categories of information in order to facilitate potential claims for their protection.

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