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Q247

Trade secrets: Overlap with restraint of trade, aspects of enforcement

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I. Current law and practice

Aspect (i) - Overlap with restraint of trade

1)	<p>Is trade secret protection viewed as a form of restraint of trade and, if so, under what circumstances and under which legal regimes (e.g. competition law)?</p> <hr/> <p>no If not please comment.:</p> <p>The legislation of the Republic of Bulgaria does not include a general legal regime of the trade secret protection. Separate provisions regulating trade secret or obligation for keeping trade secret of others can be found in the Civil Procedure Code, the Labour Code, the Elections Code, the Criminal Code, the Commercial Act, the Public Procurement Act, the Topology of the Integrated Circuits Act, the Protection of Competition Act, the Rules for Access, Use and Storage of Documents that Constitute Production, Trade or Other Secret Protected by Law, approved by Commission for Protection of Competition, etc.</p> <p>Legal definition is provided for in Para 1, item 9 of the Additional Provisions of the Protection of the Competition Act (PCA), as follows: 'Production or trade secret' shall mean facts, information, decisions and data related to economic activities, where the preservation of their confidentiality is in the interest of the right holders thereof, and for which the latter have taken appropriate measures. Art. 8.2. of the Rules for Access, Use and Storage of Documents that Constitute Production, Trade or Other Secret Protected by Law, approved by Commission for Protection of Competition includes non-exhaustive examples for such information, as follows: technical and/or financial information, know-how, methods of assessing costs, production processes, supply sources, quantities produced and sold, market shares, customer and distributors lists, marketing plans, cost and price structures, sales strategies etc. According to the practice of the Commission for Protection of Competition there is no data</p>
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comprehensively declared by law as production or trade secret. This data is very specific for each right holder and besides the fact that it should be expressly declared as such by the right holder, he/she should have undertaken appropriate measures for its preservation, including by designating such information as trade secret before the Commission for Protection of Competition. The disclosure of information specified as production, trade or other protected secret would be a violation of the Commission for Protection of Competition statutory obligation established by law.

Art. 52 of the Commercial Act imposes statutory obligation to commercial agents and proxies to protect the trade secrets of the persons who have assigned them particular work. Trade secret prevails also in case of publishing information in public procurement procedures and their appeal before the Commission for Protection of Competition - Art. 118a, Para 1 and Art.122, Para 6 of the Public Procurement Act.

Art. 126, item 9 of the Labour Code imposes statutory obligation for employees not to disclose any confidential data of their employers.

Art. 136, Para 1, Item 3 of the Civil Procedure Code provides that the court, acting either ex officio or as per the request of any of the parties, may decide that the trial or parts of the trial shall be carried out behind closed doors when the case is related to a trade, production, inventor's or tax secret, where the public disclosure of the latter would damage any protected interests.

Art. 6, Para 4 of the Topology of the Integrated Circuits Act prohibits the Bulgarian Patent Office from providing access for third parties to materials designated by their owners as trade secret unless there is a court resolution for such disclosure.

The Criminal Code also provides protection against unlawful disclosure of information. Art. 319a, Para 4 and Art. 319d, which regulate cybercrimes, incriminate the unauthorized access to computer data, computer systems and passwords or codes for access to computer systems/data that result in disclosure of information protected by law.

Pursuant to the Access to Public Information Act the protection of trade secret as defined by the PCA where the disclosure of the trade secret would result in unfair competition between traders is overridden by the prevailing public interest - e.g. for disclosure of corruption practices, abuse of power, transparency of the public authorities, etc. The public interest overrides trade secret also in case of opinion polls or sociological researches with regard to elections and/or announcement of the results from such opinion polls - according to Art. 204, Para 1 of the Elections Code information regarding the assignor, the organization that conducted the opinion poll/the sociological research, the funding sources of the opinion poll/ sociological research cannot be concealed for reasons related to official, trade or other secret protected by law.

Therefore, the trade secret protection can be viewed as a restraint of trade insofar the restrictions arising from competition law, commercial law, employment law, IP law, etc.

a) If so, under what circumstances and under which legal regimes (e.g. competition law)?

2) How does your law distinguish between general skills or knowledge acquired during the course of employment, confidential information, and trade secrets? What protection is extended to each?

There is no legal provision in the Bulgarian legislation that expressly differentiates between general skills and knowledge from one side and confidential information and trade secret from the other side, since only the trade secret has a legal definition. The distinction between general skills/knowledge and confidential information can be found in the practice, especially in terms of employment law. The court practice requires that there should be an act of the employer (respectively of the competent bodies of the employer) that determines what type of information is confidential. The employees should be

notified about the content of this act in order to be bound by the obligation for non-disclosure and non-use of such information. In addition, it is common practice for employers to sign confidentiality agreements with the employees or to include a separate provision in the internal rules of the undertaking, which defines the scope of the confidential information. Therefore, the information which is not determined and notified as confidential can be viewed as general knowledge.

The term 'confidential information' usually has a broader scope than the term 'trade secret', but these two expressions are also used as synonyms. The trade secret as defined in the PCA is any facts/decisions/data/information related to the economic activity, for the preservation of which the right holders have taken appropriate measures. This means that the trade secret can be viewed as part of the confidential information of the undertaking, but confidential information does not necessary constitute trade secret. Confidential information could also include information that can be determined as production, professional and other secret. The term 'sensitive trade information' is also used in the competition and public procurement law where it is usually part of the broader term 'trade secret'.

The PCA provides for statutory protection against unauthorized disclosure of trade secrets or against use of trade secrets in breach of the good commercial practice. Confidential information and/or trade secrets can also be contractually protected under confidentiality agreements or through internal acts of the employer which are accepted by the employee. Breach of confidentiality obligations or obligations for non-disclosure/non-use of trade secrets would lead to indemnification obligations for the person that unlawfully disclosed the information (in the form of damages, penalty etc.).

3) Are employees under a duty of confidence whether or not such a duty is set out in their contract of employment?

yes

If yes please answer the following sub-questions::

a) are express confidentiality clauses to protect classes of information broader than would anyway be protected by the employee's duty of confidence permitted; and

Employees have statutory confidentiality obligation. Art. 126, item 9 of the Labour Code provides that employees shall be obligated to be loyal to the employer, not to abuse the employer's trust and not to disclose any confidential information of the employer. The breach of this obligation entitles employers to take disciplinary measures against the employees, including to apply disciplinary dismissal (Art. 190, Para 1, item 4 of the Labour Code).

Express confidentiality clauses in the employment contracts can provide a broader protection than the protection under Art. 126, item 9 of the Labour Code. Since there is no legal definition of the term 'confidential information', the employer can define the scope of this term and what is regarded confidential information for its employees.

b) how long after the end of employment does an ex-employee's duty of confidence in relation to trade secrets last in the absence of any express confidentiality clause?

Under the Bulgarian labour legislation there is no duty of confidence in relation to trade secrets after the employment contract is terminated. It is common practice for employers to conclude confidentiality agreements which set forth on a contractual basis a certain period of non-disclosure/non-use of confidential information and trade secrets of the employer, as well as penalty clauses in case of breach of these obligations. The PCA provides for statutory protection against unauthorized disclosure of trade secrets or against use of trade secrets in breach of the good commercial practice. The prescription period for infringements under the PCA is five years.

4)	If not constrained by an enforceable non-compete agreement, may workers use knowledge acquired in the course of earlier employment in their new employment?
	yes
	If yes, is there any distinction between the types of knowledge they can use?:
	Bulgarian labour legislation does not contain any prohibitions regarding the use of knowledge acquired in the course of earlier employment in case of moving to a new employment. Employees are allowed to use knowledge acquired in the course of earlier employment in their new employment, as long as such use does not represent an infringement under the PCA or contractual breach under confidentiality or other agreement with the previous employer.

5)	Are certain employees subject to a higher obligation of confidentiality / non-use?
	yes
	If so, which employees, and what is the rationale for any distinction between employees?:
	There is no distinction between different employees under the Bulgarian labour legislation regarding the obligation of confidentiality/non-use. There are, however, special rules in the Commercial Act regarding the confidentiality obligations that apply to some commercial representatives. According to Art. 52 of the Commercial Act commercial agents and proxies are under obligation to protect the trade secrets of the persons who have assigned them particular work. Furthermore, Art. 237, Para 5 of the Commercial Act provides that management boards' members must not disclose any information they have become aware of in that capacity, if that could affect the activity and development of the undertaking (including after they are no longer board members). This obligation does not apply to information which is accessible to third parties by law or has already been disclosed by the undertaking.

Aspect (ii) - Ensuring confidentiality during Court proceedings

6)	What measures or provisions are available to preserve the secrecy of trade secrets during Court proceedings?

For example, do trade secret proprietors have access to the following mechanisms to preserve the secrecy of a trade secret during proceedings (subject to the Court's discretion to allow/disallow such access):

a)	restricted access to the hearing and / or evidence;
	<p>The restricted access to hearings as mechanism for trade secrets preservation is provided for in Art. 136, Para 1, item 3 of the Civil Procedure Code. This provision allows to the Court upon its own initiative or upon request of any of the parties to decide that the Court hearings shall be held behind closed doors when the case is related to trade, production, inventive or tax secret, whose public disclosure would damage protected interests. In case of such Court decision the hearings are open only for the parties, their representatives, experts, witnesses and persons, who have been admitted by the Court. According to Art. 138 of the Civil Procedure Code the content of the Court hearings that have been held behind closed doors is prohibited from public disclosure.</p> <p>A specific mechanism for trade secret protection is provided also in Art. 55, Para 1 of the PCA with regard to the administrative proceedings before the Commission for Protection of Competition. The</p>

parties and the interested third parties in the proceedings shall have the right to access all evidence collected in the course of investigation except for those including production, trade or other secrets protected by law. Art. 55, Para 2 of the PCA stipulates that any person submitting information to the Commission for Protection of Competition in the course of proceedings is entitled to designate some materials as including production, trade or other secrets, protected by law and such materials should be treated by the Commission for Protection of Competition as confidential. In such cases the party submitting the evidence should submit the same materials in a version in which all data considered to be confidential has been deleted. The Commission for Protection of Competition has discretion to determine whether the submitted information is trade secret or other secret protected by law or to reject the claim for non-disclosure. The Commission for Protection of Competition is entitled to disclose such materials to the other party in the proceedings when they are essential for the infringement and for the right of defense of the other party. In general, the other parties are entitled to review only the non-confidential version of the materials or a non-confidential summary of the provided information.

Art.122a of the Public Procurement Act includes similar provisions regarding the appeal procedures related to the public procurement acts. The competent authority is again the Commission for Protection of Competition.

Art. 6, Para 4 of the Topology of Integrated Circuits Act limits the access to the materials or part of them when they are defined as trade secret by the topology holder. Disclosure is allowed only upon a Court order issued in court proceedings for cancellation of the registration or for infringement of exclusive right.

Art. 38 of the Administrative Procedure Code grants the right to the parties in the proceedings to have their secrets, including those affecting their private lives, production and professional secrets, not disclosed, except in cases provided by law.

Provisions regarding the restricted access to hearings can also be found in the Criminal Procedure Code, where third parties are not admitted to court hearings when there is a risk from disclosure of secrets protected by law.

b) disclosure of evidence only to the legal representatives of the opponent, but not to the opponent themselves;

Disclosure of evidence only to the legal representatives of the opponent, but not to the opponent themselves is not explicitly provided for in the law.

c) non-confidential versions of documents being provided to all except authorised individuals;

As noted above, in the proceedings before the Commission for Protection of Competition access is provided to the non-confidential version of the submitted materials to all parties in the proceedings.

d) only non-confidential parts of any judgment / decision publicly available?

According to Art. 64 of the Judicial Power Act all acts of the courts are published immediately after their enactment subject to the limitations provided for in the Protection of the Personal Data Act and the Protection of the Classified Information Act. When the acts are being published the personal data of natural persons should not be disclosed.

The only exception regarding confidential information or trade secrets could be found in the PCA. When acts of the Commission for Protection of Competition are being published they should not

include production, trade or other secret protected by law. Such information is deleted and designated with the sign (.....)*.

7) If such (or similar) measures are available, do they apply by default, or must the trade secret holder submit sufficient evidence to convince the Court that the information merits protection?

The protection in the civil court proceedings is applied either by default or upon request of any of the parties. The trade secret holder should provide sufficient evidence to convince the Court that the information merits protection. In the criminal proceedings it depends on the judge's assessment. In the administrative bodies and courts the parties are allowed to request protection of their secrets subject to submission of sufficient evidence to the respective administrative body or the Court.

8) Whether or not such measures are available, does the Court restrict the defendant's or claimant's use - after the proceedings have terminated - of the information they gain during the proceedings?

There is no explicit rule under the Bulgarian legislation that allows the Court to restrict the defendant's or claimant's use of the information they gained during the proceedings after the proceedings have terminated. The only similar prohibition can be found in Art. 138 of the Civil Procedure Code which prohibits the disclosure of the content of the Court hearings that are not open to the public.

Aspect (iii) - Valuation of loss

9) Are damages available as a remedy for trade secret violation?

yes

If so please answer the following sub-questions::

a) how (if at all) is that value diluted by publication?

The value of damages is subject to publication

b) how are those damages quantified? Specifically, is allowance made for loss of profits; unjust enrichment; and /or what the trade secret holder would or might have charged as a reasonable royalty fee or licence?

The remedy than can be granted for trade secret violation is monetary indemnification, including both losses incurred and loss of profits.

If the violation is a breach of an obligation under a confidentiality agreement, the trade secret holder is entitled to claim damages under this contract, which could include incurred losses and loss of profits. If the parties have included a penalty clause in the confidentiality agreement, the claimant shall be entitled to claim the amount of the penalty and will be exempted from the obligation to prove the value of the damages.

The trade secret holder should prove that he/she suffered negative change in his/her property or did not receive an expected income that he/she would have received if the trade secret was not unlawfully disclosed/used (for example when a deal fails due to disclosure of trade secret, the price of the deal can serve to determine the value of the loss of profits for the trade secret holder). The value of damages is determined by an expert appointed within the court proceedings. The average royalty fee could be also used in the assessment of the value of the damages by the appointed

expert.

The Commission for Protection of Competition is entitled to impose administrative sanctions of up to 10% of the annual turnover of the undertaking - infringer for the previous financial year or fines of up to BGN 50,000 to natural persons.

c) can damages be awarded for moral prejudice suffered by the trade secret holder? If so, how is moral prejudice defined, and how are such damages quantified?

yes

Please comment:

The Bulgarian Courts are reluctant to grant remedy for moral prejudice to legal entities. Since usually legal entities are the trade secrets holders, it is unlikely that they will receive compensation for such damages. It is also difficult to imagine a situation where a natural person as a trade secret holder will receive compensation for moral prejudice due to trade secret violation, since the Bulgarian Courts grant compensation for moral prejudice as a compensation for suffered aches and pains and not as a result of trade secret violation, unless it could be proved that the trade secret holder has suffered pain as a result of the infringement over his/her trade secret.

d) If so, how is moral prejudice defined and how are such damages quantified?

Aspect (iv) - Proving infringement

10) What elements must be proved to establish violation of a trade secret?

a. Administrative violation under the PCA

Art. 37, Para 1 of the PCA provides that finding out, use or disclosure of a production or trade secrets contrary to the good commercial practice shall be prohibited. The elements that must be proved under this provision are (i) the finding out, the use or the disclosure of a third party's production or trade secret (ii) in contradiction with the good commercial practice.

Art. 37, Para 2 of the PCA prohibits the use and disclosure of trade secrets, which have been disclosed or notified under the condition not to be disclosed or used. The elements that must be proved are (i) unauthorized use or disclosure of production or trade secret when (ii) the secret was disclosed or announced by the disclosing party (iii) under the condition not to be used or disclosed by the receiving party.

In regard to the abovementioned there is an additional element that must be proved in order to establish a violation of trade secret: there should be an agreement or internal rules of the undertaking that determine what type of information or data represents trade secret. The execution of confidentiality agreement or the approval of internal rules are such appropriate measures for the preservation of trade secret.

When the Commission for Protection of Competition has found a violation of the above provisions and imposed a sanction on the infringer, a claim could be filed against the infringer before the civil courts for compensation of the damages which are result of the infringement. The final decisions of the Supreme Administrative Court which uphold decisions of the Commission for Protection of Competition finding a violation under the PCA, as well as decisions of the Commission for Protection of Competition which have not been appealed before the court or where the court appeal has been withdrawn, shall be binding for the civil courts. The prescription period for such claims is 5 years as of the entering into force of the decision of the Supreme Administrative Court or of the Commission for Protection of Competition. The consequence of such binding effect is that the claimant does not bear the burden of

proof for all elements of a tort claim under Art. 45 of the Obligations and Contracts Act (see b) below).

b. Tort claim before the civil court

The unlawful disclosure of trade secret can represent a delict (tort) under Art. 45 of the Obligations and Contracts Act. The elements that must be cumulatively proved in case of tort claim are: (i) unlawful behaviour, (ii) damages, (iii) causal connection between the unlawful behaviour and the damages, (iv) fault of the infringer. It is sufficient to prove the first three elements, since the fault is presumed. It is essential for claimant in this case to prove the damages (incurred losses and loss of profits) and their amount, since there is Court practice in Bulgaria which rejects claims for damages caused by violation of trade secrets if the damages/or their amount were not proved.

c. Claim for breach of contractual obligation

A violation of a trade secret can result from disclosure of information that is subject to confidentiality agreement. In such case, the violation consists in the breach of contractual obligation and a claim for monetary compensation under Art. 79, Para 1 of the Obligations and Contracts Act can be filed. The elements of the violation in such case are (i) a valid contractual obligation for non-disclosure of information that can be determined as trade secret and (ii) breach of contractual obligation.

If the parties have included a penalty clause in a confidentiality agreement, the trade secret holder is exempted from the obligation to prove the exact amount of the damages and is entitled to claim the agreed penalty (Art. 92, Para 1 of the Obligations and Contracts Act) provided that the breached is proved. The trade secret holder should prove the amount of the damages suffered only when the damages exceed the amount of the penalty and the trade secret holder claims remedy for the full amount of the damages.

11) What additional elements must be proved (if any) for a trade secret violation in comparison to a breach of confidence, to the extent those are different types of violations?

There is no differentiation in the Bulgarian law

12) Can constructive knowledge of a trade secret by an ex-employee or a new employer be imputed, e.g. if the subject-matter of that ex-employee's work was closely linked to the trade secret?

yes

If so, in what circumstances? :

There is no legal prohibition for employees under the labour legislation to use constructive knowledge in the undertaking of the new employer. The trade secrets could be used within the limits set forth in confidentiality agreements or internal acts of ex-employers. Furthermore, the employee should comply with the restrictions under Art. 37 of the PCA.

13) Does your jurisdiction provide for discovery?

yes

If yes, does it provide for discovery at the pre-action stage; and / or against third parties?:

The discovery is not regulated by the Bulgarian legislation. The only pre-trial stage for collecting

evidence under the Bulgarian Civil Procedure Code is the procedure for securing of evidence but it is conducted before a Court as a type of injunction measures.

14) Does the burden of proof switch to the defendant if the applicant is able to demonstrate, to a certain level of probability, that there has been a violation?

yes

If yes, what is this threshold?:

The burden of proof switches to defendant in case of a claim for damages caused by delict under Art. 45, Para 1 of the Obligations and Contracts Act. The threshold that claimant should satisfy is to prove that the first three requirements under this provision (i) unlawful behaviour, (ii) damages, (iii) causal connection between the unlawful behaviour and the damages are present. It is the defendant who bears the burden of prove in terms of the forth requirement, i.e. that a fault is not present from his side

15) Does your law provide for any other methods for securing evidence, such as seizures or ex parte measures?

yes

If so, what requirements must be fulfilled in order for the measure to be ordered and what safeguards are in place to prevent abuse?:

The securing of evidence is provided for in Art. 207 and Art. 208 of the Civil Procedure Code. Pursuant to these provisions, when there is a risk that certain evidence may be lost or its collecting may be hindered, the party may request that the evidence is collected in advance (before the filing of the claim). The other party is notified for the request for securing evidence.

16) Where seizure is available, for what purposes can it be used? To secure evidence, to prevent items entering into circulation or for other reasons?

The seizure is available only for the purpose of securing evidence - for evidence preservation/evidence collecting - when there is a risk that evidence may be destroyed or the collecting of specific evidence will be hindered in future.

II. Policy considerations and proposals for improvements of the current law

Aspect (i) - Overlaps with restraint of trade

17) Should limits be placed on the protection of trade secrets to avoid unlawful restraints on trade?

yes

If so, what limits? :

Legal definitions of the terms 'confidential information' and 'trade secret' should be implemented. At the moment considering the fact that there is no such general definition and there is no legal precedent in Bulgaria, whether or not there are restraints is a matter of interpretation.

18) Should different obligations of confidence / non-use apply to different employees? Why/why not?

Different obligations of confidence should not be applied to different employees. Such equal treatment has its grounds in the fact that the unauthorized disclosure of confidential information is more often caused by employees with lower positions in the company hierarchy than by employees with managerial functions. In addition, there is the risk that different treatment of employees can be determined as discrimination. Therefore, despite the fact that employees with managerial functions in the undertaking have access to more sensitive information in comparison to the other employees, the employers should be very careful when determining the scope of the obligations for confidence in order to mitigate the risk of discrimination.

Aspect (ii) - Ensuring confidentiality during Court proceedings

19) Should a defendant, who is sued unsuccessfully for a trade secret violation, and who learns of the trade secret during the course of the litigation, be required to not use the trade secret after the proceedings? Why/why not?

A defendant, who is sued unsuccessfully for a trade secret violation, and who learns of the trade secret during the course of the litigation should be required not to use the trade secret after the proceedings. This is also a measure for protection of the trade secret of other persons.

20) Should such obligations of confidentiality attach to information that the defendant developed independently prior to the trade secret proceedings, or develops independently after the trade secret proceedings? Why/why not?

Such obligations of confidentiality should not be attached to information that the defendant developed independently prior to the trade secret proceedings, or develops independently after the trade secret proceedings. If the information is independently developed by the defendant (and not as a result of the Court proceedings) he/she should not be responsible for unauthorized disclosure or use.

Aspect (iii) - Valuation of loss

21) Should damages as a remedy be available by default, or only where injunctive relief is (a) not possible, (b) adequate, or (c) not necessary? If by default, why?

yes
If yes please answer the following sub-questions::

a) only where injunctive relief is not possible?

no
If not please comment.:

b) only where injunctive relief is not adequate

no
If not please comment.:

c) only where injunctive relief is not necessary?

no

If not please comment.:

d) If by default, why?

Damages as a remedy should be available by default. The economic rationale behind such solution is that the harm caused by unlawful disclosure or use of trade secrets usually result in monetary damages (losses incurred and loss of profits). In addition, the Bulgarian civil legislation accepts the principle that monetary compensation should be granted to any kind of damages (including moral damages).

In addition to the monetary compensations, a positive impact on the trade secret protection could have the imposing of other sanctions such as:

- seizure of goods/products manufactured as a result of trade secret violation;
- prohibition of the manufacturing of goods/products by using unlawfully acquired trade secret.

Aspect (iv) - Proving infringement

22) Should constructive knowledge of a trade secret by an ex-employee be imputed to their new employer?

yes

If yes, in what circumstances? :

Constructive knowledge of a trade secret by an ex-employee should be imputed to the new employer provided that the trade secret as such is not disclosed. Such broad restriction could be regarded as infringement of the constitutional right of labour of the employee. The knowledge that the employee acquires during his/her previous employments is his/her value and part of his practical expertise.

23) Availability of pre-action evidence orders and seizure orders.

a) Should pre-action evidence preservation orders be available?

yes

If so, should the hearings to decide whether or not to grant them be able to take place ex parte?:

Pre-action evidence preservation orders and seizure orders should be available and the hearings to decide whether or not to grant them should be able to take place ex parte. Otherwise, a party which is acting not in good faith may take measures and hide/destroy important evidence. Therefore, if the procedures are ex parte, the risk from hiding/destroying important evidence could be limited.

b) Should pre-action evidence seizure orders be available?

24) What if the claimant learns of new trade secrets (of the defendant) during the course of a seizure?

If the claimant learns of new trade secrets (of the defendant) during the course of a seizure, he/she shall be obligated not to disclose this information. There should be provisions which regulate the liability for damages caused by unlawful disclosure of trade secrets learned during seizure proceedings.

III. Proposals for harmonisation

25) Is harmonisation in this area desirable?

Considering the fact that there is no uniform definition for trade secret in the member states of the European Union (EU), harmonisation in this area could have a positive effect on the trade secret protection. Such harmonisation could also have significant importance in the light of freedom of movement for employees within the member states of the EU. Desirable are at least minimal standards for trade secret protection

If yes, please respond to the following questions without regard to your national or regional laws. Even if no, please address the following questions to the extent you consider your national or regional laws could be improved.

Aspect (i) - Overlaps with restraint of trade

26) Please propose principles for the circumstances in which trade secret enforcement actions should fail, because such actions would be de facto restraints of trade.

27) What relief should courts give when a trade secret violation has occurred or is about to occur, but an enforcement action is barred as a restraint of trade?

When a trade secret violation has occurred or is about to occur, but an enforcement action is barred as a restraint of trade, a possible solution for Courts may be to impose an obligation to the alleged infringer not to use the trade secret for a certain period of time.

28) Should employees subject to a stricter obligation of confidentiality be released from that duty in certain circumstances? If so, in what circumstances?

The possibility to release employees from duty of confidentiality should exist. Employees subject to a stricter obligation of confidentiality should be released from that duty for example after the expiration of certain period of time as of the termination of a previous employment. Another example could be the situation when the information that constitutes trade secret becomes publicly known (either legally or through an unauthorized disclosure), then the employee should be released from the non-disclosure or non-use obligation.

Aspect (ii) - Ensuring confidentiality during Court proceedings

29) What protection for trade secrets should be available during Court proceedings, and what conditions should be satisfied for that protection to be given?

During Court proceedings there should be an obligation for the parties not to disclose information that constitutes trade, production or other secret protected by the law. This obligation should apply only when the parties have learned this information in the course of the Court proceedings (for example from written evidence, from witness statements etc.). In case of failure to perform this obligation, the party that breached the obligation for non-disclosure should be held liable for the damages caused to the other parties in the proceedings or to other interested parties.

30) If an enforcement action fails (e.g. because the defendant had independently developed the secret information and did not misappropriate it), what type(s) of confidentiality or non-use obligation, if any, should continue or cease to apply?

In case an enforcement action fails (e.g. because the defendant had independently developed the secret information and did not misappropriate it), the obligation for non-disclosure and non-use should be limited. A possible restriction that may continue to apply is the prohibition to disclose or use this information against the rules of the good commercial practices.

Aspect (iii) - Valuation of loss

31) Please propose the principles for quantifying damages for trade secret violations.

Principles for quantifying damages for trade secret violations can be:

- exact evaluation of the amount of the incurred losses/loss of profits caused by the violation at market prices; and/or
- calculation of damages based on the reasonable royalty fee which could have been due if a licence for the use of the trade secret was granted; and/or
- fair compensation of the suffered moral damages (if such can be granted at all); and/or
- full recovery of the damages caused.

32) Should courts award moral damages?

yes

If so, how should they be quantified?:

The possibility for Courts to award moral damages should be seriously considered. Since in certain situations it is very difficult for the claimant to prove the suffering of monetary damages and therefore the court rejects the claim, the possibility for awarding moral damages should be available for claimant. If he/she manages to prove the disclosure/use of trade secrets and the moral damages incurred (which should include also reputation and image damages), the Court should award remedy for such damages.

A potential concerns in Bulgaria could be the fact that moral damages for legal entity should also have a financial aspect - for example the loss of reputation (the most common example of moral damage for legal entity) should be proved in the light of reduction of customers, of dealings etc. This means that claimant still needs to prove that he/she suffered damages from the disclosure/use which may cause difficulties during Court proceedings.

Aspect (iv) - Proving infringement

33) What measures to secure or preserve evidence should be available?

The proceedings for security of evidence are sufficient to secure/preserve evidence. However, several amendments in the Civil Procedure Code are desirable. First, the hearings during a proceeding for security of evidence should be ex parte and the other party should not be informed about the request for security of evidence. Second, a sanction should be provided in case the opposing party destroys/hides evidence despite an explicit Court order (or other act) that prescribes the submission of such evidence to the Court. This would increase the efficiency of the proceedings for security of evidence and would prevent bad faith behaviour of defendants.

34) What restrictions should apply to the use of seized evidence by the claimant?

The claimant should not be allowed to use seized evidence for other purposes than to prove its claim during the Court proceedings. Special attention should be paid to a prohibition that restricts the claimant from using such information in its own business relationships. If the claimant violates these prohibitions he/she should be liable for the damages caused to the defendant.

Summary

Current situation

The Bulgarian legislation does not contain a general regime of the trade secret protection. Separate provisions regulating the trade secret can be found in some legal acts.

In Bulgaria employees are under duty of confidence, but there are no prohibitions of disclosure/use of trade secrets in case of employment change. The conclusion of confidentiality agreements binding for the parties even after termination of the labour contract is a common practice.

The trade secret preservation during Court proceedings is ensured by restricted access to hearings and evidence.

Violations may result in tort claim, breach of contractual obligations, violation of the competition law. The damages that the Court may award are monetary (suffered losses or loss of profits), but the Courts are reluctant to grant moral damages to legal entities.

There is a special procedure for securing evidence, which can be applied if there is risk from loss or hindered collecting of evidence. The proceedings are not ex parte.

Proposals

Legal definitions of the terms 'confidential information' and 'trade secret' should be implemented.

Different obligations of confidence should not be applied to different employees. Pre-action evidence preservation orders should be available and the hearings for securing of evidence should be ex parte. Damages as a remedy should be available by default. Moral damages should be applied to legal entities. During/after Court proceedings there should be an obligation for non-disclosure/non-use of information that constitutes a trade secret.

Harmonisation in the area is recommended since there is no unified regime for trade secret protection within the EU.

Please comment on any additional issues concerning trade secrets you consider relevant to this Working Question.