

The 3rd meeting of the Steering Group

Definition of confidentiality
Legal analyses from seven countries



Bulgaria

- ▶ **National legal regulation implementing provisions of the Directive 2009/38/EC?**
- ▶ Labour Code as the main legal act in charge to regulate Industrial Relations in Bulgaria regulates EWC as well.
- ▶ A special regulation on EWC – Information and Consultation of Workers and Employees in Multi-National Enterprises, Groups of Enterprises and European Companies Act. It gives additional regulation related to European Workers' Councils and the Procedure for Informing and Consulting Workers and Employees.

Bulgaria

- ▶ There is no legal definition of "confidential information" as seen in ICWEMNEGEECA.
- ▶ The following normative perceptions of confidential information can be extracted in an interpretative way – such information is, *"the dissemination of which may harm the legitimate interests of undertakings"*; and its dissemination *"could seriously impair or harm the operation of businesses or companies"*.
- ▶ The lack of a legal definition often allows employers to abuse their right to invoke confidentiality.

Croatia

- ▶ Directive 2009/38/EC has been transposed into legal system of the Republic of Croatia by the EUROPEAN WORKS COUNCILS ACT, passed by the Croatian Parliament on 15 July 2014 and published in the Official Gazette 93/14,127/17
- ▶ Neither, the Act on EWC nor the national Labour Act contain the term “confidential information”. Both acts contain term “trade secret” in sense of secrecy instead.
- ▶ The Croatian legal system uses the term “confidentiality” in The Implementation Act of the General Data Protection Regulation in a way that confidentiality means protection of personal data.

Croatia

- ▶ In the legislation of the Republic of Croatia, the trade secret is defined in two Acts:
- ▶ The Privacy Protection Act has been in force since 1996 and defines the trade secret as follows:
- ▶ Article 19.
- ▶ Trade secret is information that is defined as a trade secret by law, other regulation or general act of a company, institution or other legal person, which is a production secret, the results of research or construction work, and other data for which communication to the unauthorized person could have adverse consequences for her economic interests.
- ▶ The general act can not determine that all data related to the business of a legal person are considered to be trade secret, nor can business data be determined by the data whose communication is not explicitly contrary to the interests of that legal person.
- ▶ Data that are relevant for the business connection of legal entities or information related to the protected technical improvement, discovery or invention can not be determined as trade secret.

Croatia

In 2018 The Act on the Protection of Undisclosed information with Market Value came i force. This Act provides protection to the legitimate interests of trade secrets holders and primarily protects trade secrets with economic value as a special form intellectual property.

Neither the Act on EWC nor the national Labour Act did not provide possibility that the management is not obliged to transmit information when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertakings concerned or would be prejudicial to them.

So, when the information is relevant for economic and social rights and interests of workers management is obliged to transmit the information to the EWC or WC regardless of the fact that information is trade secret. The members of the EWC or WC shall not disclose any trade secret even after the expiry of their terms of office (EWC Act, art.30)

Croatia art. 30

- (1) Cooperation between the central management and the negotiating committee is based on mutual trust.
- (2) The provisions of paragraph 1 of this Article shall apply to the cooperation between the central management and workers' representatives within the limits of the information and consultation procedures.
- (3) The members of the European Works Council shall not after the expiry of the term disclose any confidential business information that they learn while performing the duties under this Act.
- (4) The duty of confidentiality referred to in paragraph 3 of this Article shall apply to:
 - 1) members of the negotiating committee
 - 2) workers' representatives within the limits of the information and consultation procedures
 - 3) experts and translators
 - 4) representatives of workers in the European Works Council employed in undertakings and establishments in the Republic of Croatia.

Art.30

(5) **The duty of confidentiality** referred to in paragraph 3 of this Article **shall not apply to:**

- 1) information and consultation procedures conducted with other members of the European Works Council and with workers' representatives in the undertaking, establishments or group undertakings
- 2) relations with the workers' representatives in the bodies of the undertaking
- 3) the translators or experts who assist the European Works Council.

(6) **The duty of confidentiality** referred to in paragraph 4 of this Article **shall not apply to:**

- 1) The members of the negotiating committee with respect to the experts and translators
- 2) The workers' representatives within the limits of the information and consultation procedures in respect of the translators and experts who assist them, as well as the workers' representatives employed in the undertakings, establishments or group undertakings in the Republic of Croatia.

Italy

Legislative Decree n. 113, 2012 is the National legal regulation implementing the provisions of the directive

No definition of confidential information (concerns the transposition of the recast directive into national law)

Art. 10 item 1 of the Decree: the prohibition to disclose confidential information for employees and experts “lasts for three years after the completion of the mandate (wherever they are)”. Therefore it sets a limitation to the prohibition.

How do parties know which information is or is not confidential?

Spain

- ▶ The norm that has implemented Directive 94/45 / EC into the Spanish legal system is Act 10/1997 of 24 April on the right to inform and consult employees in companies or groups of companies on Community-scale.
- ▶ This standard was later amended by Act 11/2011 of 19 May on the right to inform and consult employees in enterprises or in groups of enterprises on Community- scale. Under it, all aspects reviewed and modified by Directive 2009/38 / EC were incorporated into Act 10/1997.
- ▶ When implementing the provisions of the Directive into national law, the legislator did not define the confidential information.

Spain

- ▶ The obligation of confidentiality for the members of the European Works Council shows similarities with the obligation of secrecy laid down by the Employee Statute for employees' representatives (Article 65 of the Employee Statute).
- ▶ Those obligations are confused in spanish legal system or treated identically. In this regard, we can state that both terms (confidentiality and confidentiality obligations):
- ▶ - have the same justification based on the fact that companies want to protect information about the company, fearing that disclosure to competitors would cause serious harm.
- ▶ - they share the requirement that information be provided explicitly as "proprietary or confidential information".

Spain

- ▶ Differences between acts:
- ▶ Act 10/1997, which implements the directive, does not specify clear limits regarding the classification of information by a company as confidential, the Employee Statute stipulates that granting information confidential or proprietary status due to its nature must be justified by the legitimate and objective interest of the enterprise or group of enterprises.
- ▶ In the case of local activities, as well as at the level of the European Works Council based in Spain, subject to the same Spanish law, for a given information to be considered confidential, it is not enough for it to be unilaterally recognized by it entrepreneur, but as Constitutional Tribunal and Supreme Court emphasized, it is necessary for such information to be considered confidential in an objective manner

Spain

- ▶ Regulations regarding the issue of confidentiality of information require not only explicit recognition of such information as confidential, but also require that such recognition is done in an objective way.
- ▶ The law does not specify what should be understood as objectively confidential information, but the doctrine does provide some criteria on the basis of which such information can be attributed. Three aspects:
 - ▶ I. the existence of an objective reason why information is to be of such a nature, supported by evidence of its particular importance (that is, the ability to demonstrate the value of information of an economic, commercial or strategic nature relevant to the interests of the company).
 - ▶ II. its dissemination or knowledge of such information may become a reason for real damage to the company.
 - ▶ III. there must be specific time parameters that prevent the consolidation of confidentiality, which should not go beyond the strict necessary framework and should not in any case be interpreted as an obligation of secrecy in the strict sense, but should be understood as an obligation of discretion and / or careful use of the information obtained

North Macedonia

- ▶ North Macedonia does not have effective law which has implemented the provisions of Directive 2009/38/EC.
- ▶ There are some legal provisions in the Labor Law:

Article 94-a defines the process of information and consultation of the employees.

Article 95 strictly regulates the process of information and consultation during the collective dismissal due to economical reasons.

- ▶ National program for adoption the European Law, includes the law for European works councils. The Directive of EWC 2009/38/EC was transported in separate Law of European works councils which was adopted in 2012 but according to article 43, this law will start to be implemented after Macedonia joins the EU. This Law on European works council will be enforced after North Macedonia become EU member.

Romania

- ▶ *Law on EWC is Law no 217/2005 on establishment, organising and functioning of European Work Councils. This act implemented the Council Directive 94/95/CE regarding the consultation of European Work Councils or a procedure of information and consultation of the workers in undertakings and in community-scale groups undertakings.*
- ▶ *The Act passed in time of Romanian integration with EU.*
- ▶ *Later modified in 2006 and amended and supplemented in 2011.*
- ▶ *So, the Law 217/2005 on on establishment of a European Work Council or the procedure for informing and consulting the employees is a basic legislation regulating EWC issues.*

Romania

No definition of confidential information in the process of implementation of the recast directive.

A tip - art. 44 of the *Law 217/2005 on establishment of a European Work Council or the procedure for informing and consulting the employees:*

Members of the special negotiating body, of the European Working Council, the experts who assist them or the employees' representatives are not authorized to reveal to third persons any **information which has expressly been provided to them in confidence**, even after the expiry of their terms of office, regardless of their whereabouts.

North Macedonia

- ▶ The term “confidential” information does exist in this law but this term also exist in Labour Law.
- ▶ According to article 35 of labour Law “any information that are of business interest of the employer and have been disclosed in confidence” to the representatives of the employees and all experts assisting them shall not be disclosed to the employees or third parties. The confidentiality obligation shall survive beyond the expiry of their terms of office.
- ▶ Conclusions
- ▶ The lack of written procedure or legal act which can protect the right or can be effective legal instrument to establish certain way of getting information and consultation that can be provided to the employees, creates unfair position of the representative of the employees in receiving all necessary information.
- ▶ In such situation we can just be sure that under the term “confidentiality” the employers can justify the restricted information or consultation that will be provided to the employees.

Poland

- ▶ Directive 2009/38/ of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community – scale groups of undertakings for the purposes of informing and consulting employees (recast)
- ▶ Implemented to the Polish legal order by the provisions of the Act of 5 May 2002 on European Works Councils (consolidated text: Journal of Laws of 2012, item 1146, as amended), which entered into force on May 1, 2004. (upon Poland's accession to the European Union).
- ▶ The Act has been amended several times.
- ▶ The most important amendment took place in 2011 due to the Act of 31 August 2011 amending the Act on European Works Councils (Journal of Laws No. 213, item 1265), which implemented the provisions of Directive 2009/38 / EC and entered into life October 22, 2011

Poland

- ▶ The EWC Act does not contain a definition of a trade secret, therefore, following the system interpretation directives, one should refer to the definition of a trade secret regulated in art. 11 paragraph 2 of the Act of 16 April 1993 on combating unfair competition (Journal of Laws 2019, item 1010).
- ▶ This act implements the 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.
- ▶ Trade secret definition based on art. 2 par. 1 of Directive:
- ▶ "A trade secret is understood as technical, technological, organizational enterprise information or other information of economic value, which as a whole or in a particular combination and collection of their elements are not commonly known to persons usually dealing with this type of information or are not easily accessible to such persons , provided that the person authorized to use or dispose of the information has taken, with due diligence, to keep it confidential. "

Poland

- ▶ The polish legislator did not limit the confidential information just to the trade secret.
- ▶ Art. 36 para. 6 of Act on EWC refers to the other provisions regulating secrecy: for example stock exchange secret and tens of others.
- ▶ The good thing is that the nature of information determines its status, not the fact of being marked confidential

Conclusions

- ▶ Confidential information and more confidential information
- ▶ **More confidential information** – wording is pretty much the same
- ▶ information when its nature is such that, according to objective criteria, it would seriously harm or prejudice the functioning of the Community-scale undertaking
- ▶ *information when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertakings concerned or would be prejudicial to them* - art. 8 par. 2 in fine Directive 2009/38/EC

Conclusions confidential information

- ▶ National definitions, even if they exist, are not exhaustive. Determining what information is covered by the obligation of confidentiality requires detailed knowledge of the law. This is a challenge for professional lawyers, let alone employee representatives.
- ▶ Detailed definition in the national law seems impossible, if only due to the overlap of several national / EU legal regimes.
- ▶ Additional difficulty is the variability of the nature of the information in time confidential / publicly available
- ▶ This causes difficulty applying the directive and access to information.
- ▶ Proposal to Focus more on defining the confidential information at contract level: the definition should be accompanied by the a procedure for the parties to determine that this information is actually of this nature and the duration of confidentiality as well as the conditions of passing to the national level (art. 10 par. 2 directive 2009/38/EC .

Conclusions

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- ▶ For example the clouse:
- ▶ *„Any information wchich is either marked by the central managenet as „confidential” or „secret” or of wchich any Emoplyee’ Representative or expert is informed orally or in writting by the central management of its similar status”*
- ▶ *or*
- ▶ *„any information wchich has been provided expressly in confidence”*
- ▶ is not the answer.