

**Question B: The Protection of Trade Secrets and Know-How. Are countries providing enough or too much protection?**

**BULGARIA**

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**1. Legal Protection of Trade Secrets**

**1.1. Specific Provisions of the Bulgarian Legislation on Trade Secrets Protection**

**1.1.1. General Notes**

The Bulgarian legislation does not contain a specific statutory act, regulating trade secrets and their protection. Further, trade secrets are not considered to be intellectual property and therefore the statutory rules on intellectual property are not applicable to trade secrets.

Rules on protection of trade secrets, production secrets, confidential information or similar may be found in different Bulgarian statutory acts. For the purpose of this report a general reference to “trade secrets” shall be considered to cover any of the variations of the term, used in the Bulgarian legislation, while when discussing a specific act, the exact term of such act shall be used.

The existing rules may be divided into (i) rules providing for a substantive right to trade secret protection in the context of specific relations (*e.g.*, unfair competition torts, employment or commercial contracts) and (ii) rules guaranteeing protection of trade secrets disclosed in the contexts of administrative or court proceedings, *i.e.* rules creating procedural rights. There are a number of statutory acts that provide for secrecy obligations of state and municipality officials, or other professionals (*e.g.*, attorneys, judges, medical doctors, bank employees, etc.), which rules are considered to be outside of the scope of this report and are not discussed below.

**1.1.2. Rules Creating a Substantive Right to Protection of Trade Secrets**

Rules creating a right to protection of trade secrets may be found in different statutory acts. Below are discussed the statutory provisions, considered to be of greater significance.

**1.1.2.1. Unfair Competition Rules**

The Competition Projection Act (the “CPA”) prohibits unfair competition, which is defined as any act or omission to act in the course of business activity that is inconsistent with fair business practices and harms or may harm the interests of competitors (Art. 29 CPA). The CPA further defines and prohibits specific forms of unfair competition, among which is the prohibition for disclosure of production or trade secret (Art. 37 CPA).

To qualify as one of the specific forms of unfair competition, the relevant behaviour should exhibit not only the relevant special conditions but also the general elements of unfair completion specified in Art. 29 CPA. In particular,

there should be (i) an act or omission to act in the course of business; (ii) which is inconsistent with fair business practices; (iii) the parties are competitors on the relevant market; and (iv) the act or omission to act has resulted or may result in a harm to the interests of competitors.

Paragraph 1 of Article 37 of the CPA prohibits the obtaining, use or disclosure of production or trade secret, when inconsistent with fair business practices. Paragraph 2 of the same article provides that the use or disclosure of production or trade secret is prohibited also in cases, when the secret is obtained or provided under the condition not to be used or disclosed. The prohibition for misappropriation of trade secrets under the CPC covers cases of existing contractual relationships, as well as such where no contractual relationship exists, *i.e.*, the law provides for a right to trade secret protection when the trade secret has been disclosed or obtained in the context of contractual relations, as well as in all other cases when the obtaining or use of the trade secret by a competitor of the proprietor of the secret would be contrary to the customary business practices and (threatens to) harm(s) the interest of the trade secret proprietor. In this respect Art. 37 CPA creates a quasi-proprietary right over confidential information, which can be opposed to all third parties - competitors.

The Commission for Protection of Competition (the “CPC”) is the state authority, competent to decide on unfair competition claims under the CPA as a first instance. The CPA is an administrative body, whose decisions are subject to judicial review on two court instances – appeal before a 3-judges panel and subsequent cassation before a 5-judges panel of the Supreme Administrative Court (the “SAC”).

Proceedings before the CPC may be initiated by: (i) a petition from the persons having legitimate interest in the case; or (ii) the CPC’s own initiative (*ex officio*). The proceedings under an unfair competition claim have adversarial character *i.e.* they follow closely the standard civil action proceedings. Two sides are formed: (i) petitioner - the aggrieved party and (ii) respondent - the alleged infringer.

(i) *Trade or production secret*

The CPA contains an express definition of a production or trade secret. §1, item 9 of the Supplementary Provisions of the CPA defines production or trade secret as “*facts, information or data, related to business activities, the keeping on confidence of which is in the interest of the right holders and they have taken due measures in that regard*”. There is extensive practice of the CPC and of the SAC on the interpretation of production and trade secret under the meaning of the CPA.<sup>1</sup> There are no restrictions or limitation on the facts, information and data that may qualify as production or trade secret, as long as such facts, information and data are not part of the public domain and relate to business activities. By way of example this could be information on clients, price lists, used production technologies, offers, created company sample forms, *etc.* To fall under the statutory definition, it is necessary that the proprietor of such information has determined in a clear manner what is considered to be production or trade secret. According to existing administrative and court practice this could be done by issuing an order, internal instruction or other document, listing the specific items to be treated as secret. It is also possible that what is considered to be trade or production secret is specified in a contract (with an employee or contractor) or in a confidentiality affidavit, signed by an employee or contractor of the trade secret proprietor. General references to broader categories, such as all company-related data, all data on company’s business or similar, are not considered to satisfy this requirement.<sup>2</sup> It will also be necessary that the subjects to the confidentiality obligation are familiarized with the specific act that specifies what should be treated as production or trade secret.

In addition to the above elements, it is set administrative and court practice that to avail itself of the protection provided under the CPA, the proprietor should have undertaken due measures to preserve the confidential nature of the information designated as “secret”. In general, such measures must restrict the access to the respective

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<sup>1</sup> Decision No. 354 of 13 January 2015. of the Supreme Administrative Court on adm. case No. 6073/2012 , IVth Chamber

<sup>2</sup> Decision No. 102 of 5 January 2010 of the Supreme Administrative Court on adm. case No. 13705/2009, VIIth Chamber

information, so that only authorized persons may access it. By way of example, measures satisfying this requirement are password control for access to the information, storing the information in locked containers or premises, *etc.*

(ii) *Prohibited activities*

The scope of activities constituting violation under Art. 37, paragraph 1 of the CPA is quite broad – obtaining, use and disclosure of confidential information. Not all acts that represent obtaining, use and disclosure fall under the statutory prohibition, but only those that are inconsistent with the fair business practices. “*Fair business practices*” are defined in §1, item 2 of the Supplementary Provisions of the CPA as the common rules that determine market behavior in line with established moral standards, which stem from the law and customary business practices. By way of example, use by ex-employees of client database of former employer in a competing business established after termination of employment has been considered to be contrary to the fair business practices. On the other hand, if a client decides to follow an employee and start working with its new employer without any intervention of the employee to solicit or entice the termination of contractual relations with its former employer, this would not be contrary to fair business practices.<sup>3</sup>

Paragraph 2 of Article 37 of the CPA covers the use of disclosure of someone else’s trade secret, provided it was obtained pursuant to implementation of a contract between the parties under the express condition that the relevant information may not to be used or disclosed outside the agreed upon scope of activities. In substance, the contractual arrangement under para 2. replaces the condition in para. 1 that the act of use or disclosure is contrary to the fair business practices. Thus any act of use or disclosure not in accordance with an existing contract will violate right of the proprietor to demand protection of his trade secret.

In any event, it will be necessary that evidence are available on the illegal obtaining, disclosure of use of production or trade secret. For example, the mere fact that clients have started to work with the new employer does not represent evidence that the employee has misappropriated trade secrets of its former employer.

The CPA does not provide for specific injunctive relief that could help the trade secret proprietor to secure evidence. However, it should be noted that in addition to the evidence submitted to the CPC by the petitioner, the CPC also conducts an investigation, during which it collects evidence. In the course of its investigation the CPC may require information and documents from the parties to the proceedings, third parties, experts, state bodies, etc., and all persons and governmental bodies are obliged to assist the authority and provide the requested information. In that regard, the fact that requested information represents trade or production secret is not a reason, justifying refusal to provide the information or documents. However, the disclosing party may claim procedural protection of the respective information under Art. 55 CAP (discussed below). In the light of the statutory rules that the CPC may not only impose sanctions for contempt of authority (refusal to comply) but also accept as proven facts, regarding which a party to the proceedings or an third interested party impedes collection of evidence, all parties concerned have strong reasons to assist the authority and to provide requested information.

### **1.1.2.2. Labour Law Rules**

Art. 126, item 9 of the Labor Code (the “LC”) provides for the duty of loyalty of the employee, which encompasses among others the obligation of the employee not to disclose “confidential information” of the employer. The LC does not contain an express definition of “confidential information”. The court practice considers as confidential any

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<sup>3</sup> Art. 37 of the CPA should be interpreted restrictively, taking into account the right of individuals to choose where to work and to use the gained professional experience. Please see: P.Nikolov (ed.), *The new statutory rules for protection of competition, Labour and Law Publishing House, 2009*, pp. 393

information that is clearly indicated as such, save for information which is in the public domain or at least is well known to the people working in a particular field.

Violation of the statutory obligation for confidentiality by the employee may lead to disciplinary sanctions, as well as may trigger the employee's pecuniary (limited or full) liability.

The LC does not set any rules on the elements that should be established to launch actions against an employee. The elements that are present in addition to the fact of illegal disclosure of confidential information, serve to determine the legal remedies, available to an employer against an employee. On one hand, violation of the discussed obligation represents a disciplinary violation and may lead to disciplinary sanctioning of the employee. To impose a disciplinary sanction, the employer should only ascertain the fact of illegal disclosure of its confidential information irrespective of whether intentionally or negligently performed.<sup>4</sup> The intentional or negligent nature of the act will have relevance when determining the seriousness of the violation and the sanction to be imposed. While for imposing a disciplinary sanction damages in result of the violation of the employee are not required (they could be of relevance when determining the seriousness of the violation), to be able to engage the pecuniary liability of the employee, the employer should be able to prove that it suffered damages.

A disciplinary sanctioning procedure under the LC is based on the evidence and information available to the employer, who is not provided with specific legal measures to secure evidence. The same applies regarding cases of limited liability of the employee.

For cases where the employee bears liability for the caused damages in their full amount, the general rules on delict under the Contracts and Obligations Act (the "COA") are applicable. Tort liability under the COA is based on the legal principle that each person is liable to rectify the damages caused to a third person in result of his/her unlawful activity.

The employer will have available the standard measures for securing evidence under the Civil Procedure Code, including among others the right to request provision of evidence in possession of third parties or the other party to the proceedings, witness evidence, expert opinion, etc. Additionally, in case of threat that certain evidence are lost, the Civil Procedure Code prescribes that a party may initiate proceedings for securing evidence before or after initiating the proceedings. The other party is notified of the launching of such proceedings and constituted as a party to them.

### **1.1.2.3. Commerce Act Rules**

Under Art. 52 of the Commerce Act procurators, commercial representatives, commercial agents and intermediaries must keep in confidence the trade secrets of the persons who have assigned them performance of specific work. Similar confidentiality obligations are imposed on members of the management bodies of joint stock companies (Art. 237, paragraph 5), as well as of the licensee regarding unpatented invention, utility model or know-how (Art. 593). The provision of Art. 52 uses the term "trade secret", while the provision of Art. 593 regarding the obligations of the licensee uses the term "secret". With respect to the confidentiality obligation of the management bodies of joint stock companies, the law does not use a specific legal term but sets the confidentiality obligation in a descriptive manner. In particular, it prohibits the members of management bodies to disclose information that they have become aware of in their corporate capacity, provided disclosure may affect the business and development of the company. The confidentiality obligation continues to apply after they are released from office and does not cover information available to third persons by statute or already disclosed by the company.

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<sup>4</sup> Ruling No. 1014 of 30 July 2013 of the Supreme Court of Cassation on civil case No. 3035/2013, IVth Civil Chamber, Civil Division

The rules of the Commerce Act apply mainly to confidentiality obligations in relation to the contractual relations of the parties. The secrecy obligation is towards the principal, the company, the licensor respectively and a violation thereof does not trigger the liability of third persons. To the extent however that third parties competitors have taken advantage of the violation of the obligations under the Commerce Act, the applicability of the rules of the CPA may trigger additional liability.

In case of violation of the confidentiality obligations under the Commerce Act, liability may be sought under the rules of breach of contract, contained in the COA. The respective proprietor of the trade secret will have available the standard measures for securing evidence for a violation of the rules under the Civil Procedure Code.

#### **1.1.2.4. Trade Secrets and the Right to Access to Public Information**

The Access to Public Information Act (the “APIA”) regulates the procedure for access to public information. Under Art. 17, paragraph 1 of the APIA state and municipal authorities as well as other public entities must disclose the information created, collected or stored by them in relation to their activities. They however may not disclose information that represents trade secret and its disclosure may lead to unfair competition between merchants, unless a prevailing public interest requires disclosure. The Supplementary Provisions of the law list the cases, in which no trade or production secret is deemed to exist. Based on these rules, the following definition of trade or production secret under the APIA may be derived: “*facts, information, decisions and data, related to business activities, the preserving of which in confidence is in the interest of its proprietors*”. Unless otherwise proven, public interest for disclosure of information is at place when the information: (i) allows citizens to form an opinion and take part in ongoing discussions; (ii) facilitates the transparency and accountability of state and municipal authorities with respect to their decisions; (iii) guarantees the legal and justified performance of statutory duties by the state and municipal authorities; (iv) reveals corruption or abuse of powers or other illegal activities that affect the state or public interests, rights and obligations of other persons; (v) disproves publicly disseminated untrue information that affects significant public interest; (vi) is related to the parties, subcontractors, the subject matter, price, rights and obligations, terms, penalties, set in a contract, to which a state or municipal body is a party. A *prevailing* public interest for disclosure of the information is defined to be at place when the access to the information is requested with the aim to reveal corruption or abuse of powers, or to increase the transparency and accountability of state and municipal authorities.

Based on the discussed rules of the APIA, it may be concluded that the law creates the substantive right to state and municipal authorities to protection of trade secrets, considered to be facts, information, decisions and data, related to their business activities, the preserving of which in confidence is in their interest as proprietors of the trade secret. The state and municipal authorities have the right to refuse the disclosure of such information, as well are obliged not to disclose trade secrets of third parties, provided to them in relation to performance of their duties. While this is not expressly stated in the APIA, to the extent it is the proprietor of the respective information that may decide whether it has an interest in keeping the information as secret, in order the authorities to refuse access to information of third parties, it will be necessary that the proprietor has marked it as confidential.

Liability for violations of the obligations under the APIA is regulated by the rules of the Act on the Liability of the State and Municipalities for Damages (the “ALSMD”). Liability is based on the legal principle that each person is liable to rectify the damages caused to a third person in result of his/her unlawful activity.

The legal measures available to secure evidence of trade secret misappropriation, in result of violation of a statutory duty by the state or municipalities are those provided for by the Civil Procedure Code.

### **1.1.3 Rules Creating a Procedural Right to Protection of Trade Secrets**

A significant number of statutory acts contain rules restricting disclosure of information and/or documents that contain trade secrets, which have been submitted or obtained by the respective authorities in the context of administrative or court proceedings before them. These acts usually provide to private parties the possibility when submitting documents to the authorities to classify some of them as trade secret and for a confidentiality duty of the authorities with respect to trade secrets (either classified by the owner of the information as such or by the authorities on their own motion).

By way of example, rules allowing a party to classify information submitted by it as trade secret and providing for the duty of the respective authority not to disclose it may be found in the Public Procurement Act, the Electronic Communications Act, the Environment Protection Act, the Energy Act, the Radio and Television Act, *etc.*

Liability for violations of the mentioned acts is regulated by the rules of the ALSMD.

## **1.2 Other Relevant Legal Rules**

In addition to the rules regulating trade secret expressly, some relevance to their protection could have rules of contract law - when the obligations regarding other's trade secret is undertaken in a contract, and some of the rules of the Criminal Code.

### **1.2.1 Contractual Confidentiality Obligations**

While with respect to contractual confidentiality obligations in general there are no specifics worth noting, confidentiality obligations undertaken by employees as part of the employment contractual content pose several interesting questions. In particular, while the validity of such undertakings, which provide for additional and usually broader protection of employer's confidential information than the statutory one, are considered valid, the question on the remedies available to the employer in case of breach, remains open. In particular, the employment legislation provides for specific rules on the liability of employees for damages caused to employers. According to these rules there are cases where the liability of the employee is limited to his/her monthly salary or three times this amount.

Based on the court practice, it may be inferred that an agreement for payment of liquidated damages for breach of confidentiality obligations after termination of employment are valid and binding.<sup>5</sup> The question however on whether liquidated damages may be validly agreed for breach of confidentiality obligations during the effectiveness of the employment relationship remains open.

Indemnification in case of breach of contract is regulated by the COA. Claims for damages or injunctive relief in relation to breach of contractual confidentiality obligations are reviewed by the general civil courts under the rules of the Civil Procedure Code. The legal measures available to secure evidence of trade secret misappropriation as a result of breach of a contractual obligation are those specified in Section 1.1.2.2 above.

### **1.2.2 Criminal Liability**

While using someone else's trade secret does not constitute a crime in itself, certain criminal acts defined in the Bulgarian Criminal Code are related to unauthorised use of trade secrets. Under Art. 284 of the Criminal Code,

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<sup>5</sup> Ruling No. 8 of 16 January 2015 of the Supreme Court of Cassation on private civil case No.6476/2014, II Civil Chamber, Civil Division; Decision No. 682 of 16 December 2010 the Supreme Court of Cassation on civil case No. 2132/2008 r., IV Civil Chamber, Civil Division

dissemination or publication by an “official” of information that has been entrusted or made available to him or her in the course of his or her duties (referred to as an “official secret”) is a crime, provided the official was aware that such information represents an official secret. The legal theory and the existing court practice discuss this crime mainly in the context of public servants and corporate officials in state or other public organizations. However, the Criminal Code uses a rather broad definition of the term “official”, covering any individual, who has been entrusted to carry out against remuneration or without pay, temporarily or permanently, management work, or work related to safeguarding or managing property for a legal entity. As a result there is a theoretical possibility that (apart from disciplinary, administrative or contractual/tort liability, misappropriation of protected information by individuals in the private sector could also result in criminal liability.

In addition, Art. 319a, paragraph 4 of the Criminal Code (Computer Crimes Section) incriminates the unauthorized copying of, use of, or access to computerized data in a computer system, protected by virtue of the law as a secret. The dissemination of a password or an access key to computer systems or computerized databases, which has led to disclosure of information protected by virtue of the law as secret, is also incriminated by Art. 319d, paragraph 1 of the Criminal Code. Unfortunately there is no published case law and it remains unclear under what circumstances the trade secrets proprietor could initiate criminal prosecution.

## **2. Persons liable for trade secret misappropriation**

It is the general rule that actions for trade secret misappropriation may be undertaken against the person(s) that performed the respective violation. An exception to that rule, extending the personal scope of application of existing rules on trade secret protection may be found in the competition legislation.

The procedural rules of the CPA provide a possibility to direct enforcement not only against the persons who illegally used a trade secret, but also against third persons who benefited of such illegal disclosure. In particular, unfair competition actions may be launched against the competitor (a legal or natural person), as well as against the individual that has assisted the performance of the unfair competition act. A common example of prohibited assistance is the scenario where an (ex-)employee discloses production or a trade secret to a competitor. The liability of the employee - accomplice is accessory to the liability of the competitor. Thus, if the competitor’s conduct does not constitute a violation in itself, the accomplice may not be held liable for assisting an unfair competition act. Additionally, even if an act of unfair competition is found to be at place, the employee would not be held liable in person for assisting, if s/he did so in the capacity as employee or contractor of the competitor. In other words, personal liability is only present where at the time the respective act was performed, the individual did not have an employment or contractual relationship with the competitor.<sup>6</sup> If an ex-employee becomes a manager or employee of a competitor, or creates a competing business, then this competitor or newly created business could be sanctioned for unfair competition, but the ex-employee would not be personally liable, since it will be regarded as a legal or de facto representative of the perpetrator.

## **2. Procedural Aspects and Remedies in the Event of Trade Secret Misappropriation**

### **2.1. Available Mechanisms to Protect the Confidentiality of Information in the Course of Legal Proceedings**

#### **2.1.1. Unfair Competition Proceedings**

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<sup>6</sup> Decision No. 9954 of 9 April 2012 of the SAC on adm. case No. 3900/2012., IInd Grand Chamber

Art. 55 of the CPA contains rules on restricting the access, disclosure and related actions with respect to information and materials collected in the course of unfair competition proceedings. On the grounds of paragraph 4 of the same article, the CPC has adopted Rules on the access, use and storing of documents that represent production, trade or other secret protected by the law (the “Rules”), which regulate in further detail the conditions to treat information as confidential, exceptions to the confidentiality obligation, *etc.*

Under the existing legislation, the parties to CPC proceedings and third persons who submit information to the CPC, have the right to mark certain documents or information contained therein as (containing) production or trade secret or other information protected by the law as confidential. Such information and documents should be treated by the CPC as confidential. The parties that identify information or documents as confidential are obliged also to provide reasons for their claim and submit a “public version” of the document, in which the confidential information is deleted. Pursuant to the Rules, confidentiality protection may not be granted to information that: (i) relates to an undertaking but is also known outside the respective undertaking; (ii) is publicly accessible or subject to public disclosure (*e.g.*, financial statements of companies, which must be published in the Commercial Register) or (iii) has lost its commercial value, by way of example due to expiry of a period of time.

Despite the fact that a party has classified in its submission certain data as confidential, the CPC may decide that it does not represent trade or production secret or other secret protected by the law and refuse protection. This ruling of the CPC in this respect is subject to appeal before the SAC. If the SAC confirms the ruling of the CPC, the respective information is treated as non-confidential.

Additionally, the CPC may decide that certain evidence, even though marked as confidential, should be disclosed to the parties to the proceedings, on grounds it is of importance for proving the violation or for exercising their right of defence. In order to decide whether to order disclosure the CPC should weight facts like the importance of the information for proving a violation – *i.e.* its evidentiary value, as well as the degree of sensitivity - *i.e.*, to what extent disclosure may harm the legitimate interests of the proprietor.

If CPC decides to disclose confidential information upon its own motion access is provided to all parties to the proceedings. It may also disclose information upon the request of one of the parties, in which case access is provided only to the party that requested it. The CPC may also reject a disclosure request. In all cases the CPC decision is expressed in a ruling. Pursuant to the Rules, the ruling with which the CPC grants access may be appealed before the SAC by the proprietor of the information. However, a ruling rejecting a request for access is considered to be a ruling of procedural nature which is not subject to separate appeal.<sup>7</sup> The party that was refused access may challenge the refusal as part of an appeal against the final CPC decision on the case, claiming due process violation in the course of the administrative proceedings.

Except for the above described exception, information and documents, marked as confidential, are not disclosed to third parties and not mentioned in official communication. Thus, after completion of the investigation stage, the parties are invited by the CPC to familiarise themselves with the collected materials. But they will receive access only to the non-confidential materials and to the public versions of the confidential documents

After completing the investigation and once the parties have had a possibility to familiarise themselves with the collected materials, the proceedings continue with a hearing. While with respect to other proceedings before the CPC (*e.g.*, antitrust, concentrations, *etc.*) the law provides for a possibility for a closed hearing, no such option is available with respect to hearings on unfair competition cases which are open to the public.

Confidentiality is also protected with respect to the public version of the final decision that the CPC issues on the case, where it may not cite or reproduce information from documents that have a confidential status. For this purpose the CPC actually issues 2 decision – one complete confidential version and a second edited public version, in which

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<sup>7</sup> Decision No. 7116 of 20 May 2011 of the Supreme Administrative Court on adm. case No. 4516/2011 , IVth Chamber



the confidential sections are deleted. The parties are normally provided only with the public version of the decision. If the decision is appealed before the SAC, the complete version of the decision is provided to the court, but this version is not disclosed to the litigating parties and preserves its confidential status, unless the court expressly authorises disclosure on motion by one of the parties.

Further, if the CPC decision is appealed, the materials that represent production and trade secret also preserve their confidential character and it is only the SAC that has access to them. It is worth noting, that even if a party has not requested access to information classified as confidential during the proceedings before the CPC, if the decision is appealed a party may request to be provided with access by the SAC. In other words, failure to request access in the administrative stage does not automatically prejudice the rights of the parties in the judicial review phase, although this inaction could be interpreted in their disadvantage. Still situations are possible where in its decision the CPC relies on documents and materials, classified as confidential, with respect to which at the stage of the administrative proceedings it was not clear whether and to what extent such documents were relevant and important for the final outcome. Therefore, only after issuance of the final decision of the CPC the importance of such materials becomes clear, and hence, it is only in the course of the subsequent judicial appeal that the party may request access.

### **2.1.2. Other Legal Proceedings**

The Civil Procedure Code regulates the confidentiality measures available to the parties in civil litigation, which is the only enforcement avenue available for cases of violation of the labour law rules when the employee bears full liability and one of the options (together with unfair competition proceedings) for breach of the statutory or contractual duty of confidentiality in commercial setting. Pursuant to Art. 136 of the Code the court may rule *ex officio* or upon the request of one of the litigating parties to hear the case in a closed session – i.e. in the presence only of the parties, their counsel, court-appointed experts, witnesses and persons expressly admitted by the court. One of the grounds for having a closed hearing is that the case is related to trade, production, invention-related, or tax secret, disclosure of which may harm legitimate interests of a party. The hearing minutes are also kept confidential and not disclosed outside the limit of the participating parties. Unfortunately, while such procedural protection is possible for the hearing itself and the minutes from the hearing, the case file remains fully accessible.

In relation to the statutory acts that create procedural right to protection of trade secrets, discussed in Section 1.1.3. above, it is important to note that the right to protect the confidentiality of trade secrets in the context of administrative proceedings developing before specific authorities, continues to apply also if the decisions of the respective authorities are appealed before the courts.

## **2.2 Available Legal Remedies**

### **2.2.1 Unfair Competition Rules**

If the CPC finds that a violation has been committed, it will order (a) discontinuation of the violation and (b) impose a pecuniary sanction of up to 10% of the turnover of the company for the previous financial year, payable to the state budget. The individual who is found to have assisted the unfair competition act, is imposed a monetary fine in the range of BGN 500 to BGN 50,000. Since the sanctions imposed are of purely administrative nature, the CPC cannot award damages to the aggrieved party, even if it has found violation of the provisions of the competition legislation and has sanctioned the perpetrator.

The possibility for sanctioning the infringer under the rules for protection of competition exists independently of any other remedies, available to the party, whose rights and interests have been violated in result of the unfair

competition behaviour. It may claim compensation in damages on the basis of the Bulgarian tort rules before the courts of law. If however a violation of paragraph 2 of Art. 37 is found to be at place, then the available recourse would be a claim for compensation in damages as a result of breach of contract.

A final decision of the SAC, confirming a decision of the CPC on unfair competition case, has binding effect on the civil courts regarding the existence of a violation – i.e. the courts may not challenge the CPC findings. Moreover, a final decision of the CPC (not appealed or when the appeal is withdrawn) has the same binding effect on the civil courts. The CPA introduces a special statute of limitations for damage claims which lapse 5 years from entry into force of the decision of the SAC or the CPS, as applicable.

### **2.2.2. Labour Law Rules**

Violation of the confidentiality obligation gives the employer the right to impose disciplinary sanctions on the employee, including among others a disciplinary dismissal. Additionally, if the employer has suffered damages as a result of the employee's violation, it may claim compensation of damages. Pursuant to the LC, the employee may bear either a limited or a full financial liability for violations during his/her employment. The liability of the employee is limited if the employee has caused the respective damage negligently, in the course of performance of employment duties. The liability in such cases is limited to the monthly salary of the employee, or, respectively - three times the monthly salary if the employee holds a position with management functions or is assigned tasks related to collection, safeguarding, spending, or accounting of property. The procedure for recovering these damages is established in the LC and is carried out through deductions from the employee's remuneration.

The employee is liable to compensate the employer in full if the damages are intentionally caused in the course of performance of employment duties, or if caused as a result of a crime, or if caused not in relation to performance of employment duties. In such cases, the employer will be able to claim full compensation under the general tort rules for all damages, including loss of profit, incurred as an immediate and direct consequence of the violation. The enforcement of such full financial liability is implemented by the courts, and is based on a civil claim made in accordance with the Civil Procedure Code.

### **2.2.3. Violations of a Statutory Obligation to Protect Trade Secrets**

Liability for violations against protected secret committed by the state or municipality or their officials is regulated by the rules of the Act on the Liability of the State and Municipalities for Damages (the "ALSMD") and by the general tort rules under the COA with respect to the obligations of private persons. Liability under both acts is based on the legal principle that each person is liable to rectify the damages caused to a third person in result of his/her unlawful activity. Basically, the elements triggering liability under both acts are the same, as the differences stem from the specific capacity of the infringer in the case of liability of state and municipalities.

The ALSMD regulates the legal mechanisms available to individuals and legal entities to seek compensation for the damages caused to them in result of illegal acts of the state, municipalities and their officials. Liability under the ALSMD is triggered by the following elements: (i) illegal act or omission to act; (ii) performed by a state or municipality authorities or their; (iii) final decision of the court or other competent body ascertaining the illegality of the act or omission to act; (iv) damages and (iv) link between the illegal act or omission and the uncured damages. Fault is not required. The proceedings develop before the administrative courts in accordance with the rules of the Administrative Procedure Code.

Under the rules of the COA, tort liability arises when all of the following elements are at place: (i) illegal activity/omission to act; (ii) damages; (iii) fault and (iv) link between the illegal activity/omission to act and the incurred damages. The proceedings develop before the civil courts under the rules of the Civil Procedure Code.

In both cases, it is necessary to prove that there was a statutory duty to keep certain information as confidential and the activity that caused damages violated such statutory duty. In addition to the capacity of the infringer, the main difference between the two procedures is that in the case of liability of the state or municipalities, proof of fault is not required, while for cases of tort liability under the rules of the COA proving fault is an obligatory element. The law however contains a statutory presumption that fault is deemed to exist until the defendant proves otherwise.

#### **2.2.4. Violations of a Contractual Obligation to Protect Trade Secrets**

It should be noted that even if a confidentiality obligation is not included in the contract between the parties, but the law provides for a confidentiality obligation in connection to the specific contractual relations (e.g. licensee of know-how), the available remedies will be damages for breach of contract instead of damages in tort.

The usual remedy for breach of contractual confidentiality obligations is compensation for damages or alternatively - liquidated damages, if agreed by the parties. Subject to compensation are the damages suffered as a direct and immediate consequence of the breach, which damages have been foreseeable at the time of execution of the contract. For cases where the infringer has acted in bad faith, all pecuniary damages, direct and immediate consequence of the breach, should be compensated. Based on the most recent interpretative decision of the Supreme Court of Cassation (which is mandatory for all civil courts), breach of contract entitles the aggrieved party to compensation not only for the suffered pecuniary damages, but also for the suffered non-pecuniary damages.<sup>8</sup> Non-pecuniary damages are determined on the basis of the principle of equity. Depending on how essential is the confidentiality obligations for the contractual relationship, a breach may also serve as a ground for rescinding the contract.

### **3. Protection of Know-How in Confidentiality or Non-Disclosure Agreements**

The Bulgarian legislation does not contain a definition of know-how. Know-how is not considered to be intellectual property and there are no rules that provide for a statutory obligation for protection of know-how. Therefore know-how may be protected only pursuant to a contractual undertaking of the parties defining what shall be considered to be know-how and any specifics of the confidentiality obligations with respect to such know-how.<sup>9</sup> This means that to the extent the parties to a contract agree that certain information shall be treated as know-how and therefore – is confidential, such agreement shall be binding on them even if it appears that the information in question is known to other unrelated persons.<sup>10</sup>

As already noted above, the Commerce Act contains some limited regulation of know-how confidentiality obligations in the context of licensing agreements.<sup>11</sup> Pursuant to that act, use of know-how may be licensed by means of a licensing agreement. It also provides that a licensee has confidentiality obligations with respect to licensed know-how. Considering however that what shall be treated as know-how is subject to the contractual agreement of the parties (no statutory definition exists in this respect), the confidentiality provision of the Commerce Act

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<sup>8</sup> Interpretive Decision No. 4/2012 of the 29 January 2013 of the Supreme Court of Cassation, Plenary Session of the Civil and Commercial Divisions. Before adoption of this decision, the prevailing position was that non-pecuniary damages may not be awarded for breach of contract.

<sup>9</sup> Interestingly, for the purposes of personal income taxation, intellectual property is defined to also include know-how.

<sup>10</sup> This may not be the case from tax-law point of view, since as noted above, the tax legislation gives to know-how the same status as to intellectual property.

<sup>11</sup> Decision No. 13924 of 24 October 2013 of the Supreme Administrative Court on adm. case No. 3184/2013 , Vth Chamber

regarding know-how does not change the fact that protection of know-how may only be achieved on contractual basis.

The law requires that licensing agreements, including among others for use of know-how, are executed in a written form. This is the only formal requirement that needs to be complied with and there is no need to register the agreement with any public authority to ensure its validity. Still, the Commerce Act requires that a license agreement regarding know-how is recorded with the respective register, kept by the Bulgarian Patent Office. While this is not a requirement for validity of the license, it should most probably be regarded as a condition to have effect towards third parties. The respective statutory provision covers licenses to use industrial property and know-how and given that the registration of a license regarding industrial property (e.g. trademarks, patents, designs, etc.) is a condition for the effectiveness of the license towards third parties it may be assumed that the same effect is provided for a license of know-how.<sup>12</sup>

The requirement for registration of a license of know-how is an interesting peculiarity of the Bulgarian legislation, the rationale of which however is not that clear. On one hand, know-how undoubtedly does not enjoy protection as intellectual property simply by the fact of registration. On the other hand, given the scarce regulation of know-how, there are no rules on how the confidentiality of information, provided to the Patent Office regarding know-how, will be preserved after registration. Moreover, the register of recorded license agreements for know-how is public. Therefore, the approach undertaken by the Patent Office is that it does not require detailed description of the know-how, being licensed, but only some limited description, which does not reveal confidential elements.

Breach of the confidentiality obligation undertaking regarding know-how by way of a contract, will trigger the contractual liability of the infringer under the rules of the COA. The procedure will develop under the rules of the Civil Procedure Code.

#### **4. Misuse of Trade Secret Protection**

The Bulgarian legislation does not contain express rules on misuse of trade secret protection. Based on the existing legislation, misuse of trade secret protection may in some cases constitute an antitrust violation. Additionally, misuse of trade secret protection in relation to participation in administrative or judicial proceedings may in some cases qualify as abuse of procedural rights.

##### **4.1 Antitrust Violations**

In theory misuse of trade secret protection could represent an antitrust violation both in cases of collective action and with respect to unilateral conduct. The CPC has noted that under specific situations know-how licensing agreements between competitors may have market foreclosure effect or lead to prohibited exchange of sensitive information in violation of the rules of Art. 15 of the CPA (the national equivalent of Art. 101 of the TFEU). However, the authority has not yet faced such situations in its practice and there are no decisions that can clarify under what circumstances licensing and confidentiality agreements could be deemed prohibited.

Misuse of trade secrets by a single undertaking may constitute an antitrust violation in the context of Art. 21 of the CPA (the national equivalent of Art. 102 of the TFEU). Of course, such an infringement can be committed only by companies that enjoy a position of dominance. In this respect two distinct situations can be hypothesised: (i) dominance could result from the ownership of specific know-how and could be enforced by protection of such know-how as trade secret; or (ii) the position of dominance can be a result of other circumstances, but actions of the dominant company with respect to protection or sharing of its trade secrets can be considered abusive.

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<sup>12</sup> There is no court practice on the requirement for registration of know-how licensing.

So far the CPC has not encountered the first situation in its practice, but there are examples of the second scenario. Recently the CPC issued a statement of objections<sup>13</sup> against several subsidiaries of CEZ (one of the electricity distribution companies in Bulgaria), alleging abuse of dominant position by implementation of a common strategy on the market for supply of electricity towards end customers interconnected to the medium and high voltage power distribution grid, thereby discriminating independent suppliers outside CEZ group and limiting electricity trade by: (i) exchange of important information about clients, switching from regulated supplies to the free market, and (ii) creating obstacles to the process of switching to a free market supplier. Electricity distribution is subject to licensing regime and only one company can obtain a license for a specific region of Bulgaria. As a result of those legal barriers, CEZ (or more precisely – CEZ Distribution - the subsidiary managing the distribution grid) has monopoly on several regional markets for electricity distribution. In the process of managing supply to individual industrial customers, CEZ Distribution inevitably collects data on their consumption and load and its variations in time. This information is proprietary to CEZ Distribution, but it is extremely valuable to suppliers, who need to anticipate demand fluctuations and plan deliveries. According to the CPC official press release, CEZ Distribution provides to CEZ Trade (the subsidiary managing free market supplies) access to its proprietary data for free, but refuses to grant access to third party suppliers, or at least does so at prohibitively high prices. Consumption data cannot be regarded as an “essential facility” since traders are able to supply electricity without it, but they would need to rely on estimates and buffer capacity. In this respect access to consumption statistics provides a significant edge to CEZ Trade, since the latter can make much more accurate demand projections and thus could service a higher number of customers. Thus in the opinion of the CPC, by refusing to grant access to its database CEZ Distribution is distorting competition on the supply market. This case is still pending before the authority and it will be interesting to see what will be the final outcome.

#### **4.2. Abuse of Procedural Rights**

In the context of civil proceedings under the Civil Procedure Code there is no possibility to restrict the access of one of the parties to confidential information presented by the other party (the right of defence prevails over the right to protection of trade secret).

For proceedings under the CPA however, the access to production, trade or other secret protected by the law may be restricted by the party providing the information, subject to a positive decision of the CPC (see Section 1.1.2. above). This procedural right is applicable with respect to all proceedings conducted before the CPC in accordance with the CPA – antitrust investigations, merger control, unfair competition, sectorial surveys etc. However, when exercising their procedural rights to demand confidentiality, a party to the proceedings could prejudice the defence rights of other parties by expanding the protection available to trade secrets over non-sensitive data. The SAC has reviewed cases of such abusive application of the right to demand protection of trade secrets and notes that it would constitute a material breach of procedure, since as a result of the restricted access to evidence the other parties to the proceedings were not able to effectively defend themselves.<sup>14</sup>

As already noted above, the procedural right to restrict access to trade secret is also provided in a number of other statutory acts in relation to specific administrative proceeding. In particular, the law allows that parties or the authorities, as the case may be, to classify certain information as trade secret, which will preclude the access of all or some of parties to the respective information. By abusively qualifying as confidential information that objectively is not trade secret, the parties to administrative and court proceedings regulated by the Administrative Procedure Code could violate the right of effective defence of the other parties to the proceeding.

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<sup>13</sup> The case has not yet progressed to a decision and there is only a limited amount of information publicly available. The official press release was made on 25 July 2014 – available at: <http://reg.cpc.bg/Dossier.aspx?DossID=300043217>

<sup>14</sup> Decision No. 8584 of 25 October 2004 of the Supreme Administrative Court on adm. case No. 3977/2004 , Vth Chamber

An interesting case of abuse of the procedural right to demand protection of trade secrets was reviewed by the SAC in relation to the rules of the Public Procurement Act. This statutory act permits the contracting authority not to disclose certain information in relation to the public procurement, which represents trade secret. Additionally, the bidders in a tender may also indicate that some of the information submitted by them is confidential. Appeals against public procurement tenders are reviewed by the CPC acting as a first instance tribunal. The decision of the CPC is subject to appeal before the SAC. During the CPC proceedings the contracting authority – in the capacity of defendant, stated that the tender file contains a lot of documents that are trade secret so the entire file should be treated as confidential. The CPC did not object and restricted appellant's access to the file. Not surprisingly, this also led to a decision in favour of defendant. On appeal the SAC found that by taking a passive approach with respect to the qualification by the contracting authority of the whole tender file as trade secret, the CPC committed a serious due process violation.<sup>15</sup> The SAC ruled that the contracting authority abused its procedural right to qualify some of the information as confidential, because a greater part of the tender file did not contain sensitive data and could not be regarded as a trade secret. Moreover, by taking a passive approach regarding such qualification of the information, the CPC violated the law, requiring that the parties to the proceedings are provided with access to all evidence pertinent to their defence. In result, the SAC concluded that the appellant was deprived of the right to organise its defence in an effective manner and for these reasons, the court quashed the CPC decision and reminded the case for de novo review.

## **5. Conclusion**

The Bulgarian legislation contains different rules, providing for trade secret protection. Part of these rules provide for a substantive right to demand protection of trade secret towards a specific limited category of counterparties (e.g. competitors under the CPA, agents and contractors under the Commerce Act), and the rest – a procedural right to demand protection in the context of administrative or judicial proceedings (e.g. the Access to Public Information Act, the CPA – Art. 55, the Public Procurement Act, etc.). With a few exceptions, most of these acts do not contain a clear definition of trade secret. Additionally, the different acts use different legal terms in relation to information that should be granted protection due to its sensitive character. In some cases the same statutory act contains several terms to designate the same notion of trade secret (e.g. confidential information, trade secret and their synonyms in the Bulgarian language). The differences in the legal terminology leads to uncertainty regarding the scope of application of the statutory act or the respective provisions. Additionally, different acts (even those regulating in substance the same matter – e.g. procedural right to protection of trade secrets) provide for different sets of exceptions to the granted protection.

Furthermore, none of the available statutory acts create a general right of protection of trade secrets that can be opposed to all third parties, since all of them regulate specific fields of socio-economic relations (e.g. competition, employment relations). Therefore, it can be stated that in Bulgaria there is no universal protection of trade secrets and for fields where the effective legislation does not contain any rules on trade secrets, protection may be obtained only on the basis of a contract – i.e. by way of a confidentiality agreement between the disclosing and the receiving party. For cases however where there is neither a contractual relationship at place nor a statutory duty of confidentiality, it is very likely that the affected party will not be able to obtain protection. The rules of tort will not apply since the principle that each person is obliged to remedy the damages illegally caused to another person requires a statutory duty that has been violated.

In the light of the variety of statutory rules and the lack of universal protection of trade secrets, the EU-wide initiative for adoption of a directive on trade secret protection to harmonise the legislation of the member states in that filed should be welcomed. The existence of general rules on trade secret protection will guarantee to the parties

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<sup>15</sup> Decision No. 15766 of 21 December 2010 of the Supreme Administrative Court on adm. case No. 14098/2010, IVth Chamber

to different types of relationships protection of their trade secrets, will prescribe common basis for determination of information as trade secret or not, which will guarantee greater predictability and legal certainty.