

Legislative changes regarding the protection of business secrets

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On 19th April 2019, Emergency Ordinance No. 25/2019¹ (“EO”) came into force, introducing a series of regulations to protect business secrets. In particular, it contains several practical measures that can be requested by holders of business secrets against the unlawful acquisition, use or disclosure of their business secrets.

Context

The EO transposes a EU-Directive² from 2016. The implementation deadline actually expired on 9th June 2018, but following a request by the Commission on 20th July 2018, Romania requested and was granted a deadline extension until 20th November 2018.

The business secret

Information is regarded as a business secret when the following three conditions are met³:

- It is confidential, meaning that neither as a whole, nor in part is it known or made accessible to the persons belonging to the fields normally handling this type of information;
- It has a commercial value because it is confidential. The value of the information is based, therefore, on its inaccessibility to third parties;
- It represents the object of the measures taken by the person with legal control over the information, depending on the circumstances, with regard to keeping it secret.

Legal protection

The EO regulates the options the holders of business secrets dispose of to protect these against an unlawful acquisition, use or disclosure. The exact cases when acquisition, use and disclosure are unlawful is also regulated in the EO. It is worth mentioning that also the use of so called ‘infringing products’⁴ is considered as unlawful use.

If a business secret is unlawfully affected according to the EO, the holder can ask the court to do the following:

- Stop or forbid the use or disclosure;
- Forbid producing, making available, trading or using the infringing products, or forbid the import, export or storage of infringing products;
- Enforce correction measures to deal with the unlawful nature of the infringing products;
- Award compensation for damages;
- Impose disclosure of the court judgment.

¹ on the protection of the *Knowhow and confidential business information representing business secrets against unlawful acquisition, as well as unlawful use and disclosure*

² Directive (EU) 2016/943

³ The EO 25 changes the law 11/1991 against unfair competition

⁴ Products the conception, characteristics, functioning, production process or marketing of which is based significantly on business secrets acquired, used or disclosed unlawfully

Interim relief

To guard against potential infringements of their business secrets, holders can request the following interim legal measures:

- Preliminary cancellation or preliminary interdiction of the use or disclosure of the business secret;
- Interdiction upon the production, disposal, commercialization or use of infringing products, or the import, export or storage of infringing products for such scope;
- Confiscation of presumably infringing products, including imported products, to prevent their placing or circulation on the market.

Alternatively, the court can allow the further unlawful use of the business secret against certain securities that would ensure that the holders' losses would be compensated.

The interim measures are advantageous, in principle, because they can be requested before the delivery of a court judgment on the alleged infringement. The holder does not therefore have to wait until the case comes to judgment, but will benefit from protection measures before the final judgment is delivered.

Nor does the holder need to provide full evidence of the infringement. He must submit, upon request of the court, all reasonable available evidence, to convince the court that the business secret he holds does in fact exist, and that it has been or risks being acquired, used or made available unlawfully by another person.

Sanctions for ignoring the measures set by the court

If the court makes a final judgment that the holder's business secret has been infringed, and this judgment is not obeyed by the defendant, the latter will be sentenced to a term in prison ranging from three months to two years, or will be punished by a fine.

Those not observing interim measures must reckon not just on paying damages, but also paying fines of 0.1 to 1% of the previous year's turnover, not less than 10,000 RON (ca. 1,150 EUR) per day.

Conclusion

The changes brought by the legislative body are welcome, since they help holders of business secrets protect their treasure.

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