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BULGARIA TO IMPLEMENT THE EU TRADE SECRETS DIRECTIVE

SUBSTANTIVE PROTECTION AND ENHANCED PROCEDURAL FRAMEWORK COVERING GOODS AND SERVICES. BUSINESSES NEED TO IMPLEMENT TRADE SECRETS STRATEGIES, INCLUDING IDENTIFICATION, PROTECTION MEASURES AND STRUCTURE PROPERLY POTENTIAL CLAIMS.

With considerable delay and after a long public discussion, the Bulgarian legislator is now expected to adopt efficient legislation for protection of trade secrets. On 02 January 2019 the Bulgarian Council of Ministers proposed for adoption to the National Assembly a draft Trade Secrets Protection Act ("**Draft Act**").

Under existing Bulgarian law trade secrets protection is not as advanced as protection for other IP rights. The applicable legal framework is currently fragmented between the Competition Protection Act ("**CPC**"), addressing mainly unfair competition practices related to trade secrets, and the Commerce Act ("**CA**"), which addressed trade secrets in the context of commercial transactions. The existing provisions and remedies in those acts will remain in force, but will be complemented and considerably extended by the Draft Act.

The Draft Act is intended to introduce into Bulgarian law the provisions of Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) ("**EU Trade Secrets Directive**"). Initially it was envisaged to amend the CPC and the CA, but after a careful analysis the Bulgarian Patent Office, which was in charge of the transposition, came to a decision that an entirely new act was required in order to achieve the goal of the EU Trade Secrets Directive and to assure a coherent framework.

Main elements of the Draft Trade Secrets Protection Act

The Draft Act follows closely the EU Trade Secrets Directive by retaining similar definitions for *trade secret*, *trade secret holder*, *infringer* and *infringing goods*. Thus, any commercial information, know-how or technological information may be considered as a trade secret if it is at the same time:

(i) secret in a way that it is not, as a body or in the precise configuration and assembly of its components, generally known among, or readily accessible to, persons within the circles that normally deal with the kind of information in question,

(ii) holds commercial value because it is secret, and

(c) subject to measures to keep it secret, undertaken by the person lawfully in control of the information.

A particularity of the Draft Act is that it contains additional provisions to extend the provided protection not only against goods, infringing trade secrets, but also against services which characteristics and way of provision are based on trade secrets infringements. This addition derived from the public consultation process, where such proposals were heavily advocated.

The Draft Act provides a system of remedies for protection of trade secrets. In case of misappropriation of trade secrets, legitimate holders will have entirely new remedies in line with the EU Trade Secrets Directive. In particular, the Draft Act provides that trade secret holders may request civil courts to (i) establish the existence of an infringement, (ii) order the cessation or the prohibition of such infringement, (iii) prohibit production, offering, placing on the market or use of goods infringing trade secrets, or the importation, export or storage of such goods, (iv) prohibit provision of infringing services, and (iv) order destruction or hand-over back to the claimant documents or devices containing trade secrets.

The claims for trade secret infringement are subject to a limitation period of 5 (five) years.

The inherent tension between the confidentiality of a trade secret and the public nature of judicial proceedings is addressed, in line with the EU Trade Secret Directive, by provisions aiming to ensure the confidentiality of the trade secrets during the judicial proceedings.

The Draft Act provides also for wide evidentiary powers of the courts. A particularity is the explicit power of the courts to order respondents to disclose information on how the infringer has obtained the trade secret (including how and from whom), how it the trade secret was used and to whom it has been disclosed. Although the EU Trade Secrets Directive does not contain such provisions, the Draft Act adopted some of the proposals in the public consultation process in this respect.

In line with the EU Trade Secrets Directive, the Draft Act also provides wider possibilities to request interim measures from the courts.

Last but not least, the Draft Act provides specific rules for the calculation of the damages resulting from trade secret infringement, which aim to take into consideration the particularities of such cases and the difficulties which may result in the quantum of the damages. When establishing the amount of damages, courts will have to take account not only of direct damages and loss of profit, but also of elements such as the profit realized by the infringer and non-material damages to the trade secret holder.

A positive development, which requires careful preparation

The adoption of the Draft Act, which is expected to occur in Q1 2019, will bring Bulgarian law in line with EU standards in terms of trade secret protection. This development could be very beneficial for business in sectors implying sensitive information, such as HiTech,

IT, Pharma, Business Services, Marketing, Outsourcing etc., which are fast growing business sectors in the last decade in the Bulgarian economy.

In order for businesses to benefit from the new provisions, however, they should put in place and execute trade secret protection measures concerning all information considered valuable for the business. In particular, steps to consider include (i) identification and mapping of any information susceptible to be trade secret for the company, (ii) adopting technical protection and traceability measures, (iii) adopting internal legal rules (such as internal confidentiality policies, confidentiality clauses in contracts with third parties, etc.) and (iv) inform accordingly the relevant departments and employees.

Upon final adoption of the Draft Act we will provide further update and analysis of the final text and its practical implications. For an overview of the implementation of the EU Trade Secrets Directive in Austria, Croatia, Czech Republic, Poland, Romania, Serbia, Slovak Republic and Slovenia please consult our newsletter at the following [link](#).

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