

Legal Framework Issues Managing Confidential Business Information in the Republic of Croatia

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Abstract – Confidential business information in the Republic of Croatia is regulated in an insufficient mode - the Data Confidentiality Act provisions are still on force for more than 20 years, and entirely inadequate for today's time. Considering that information is now greatly kept in electronic form, it is necessary by the internal documents, and in accordance with the existing outdated legislation, to regulate in detail the issues of confidential business information. In case of exchange of business information which are confidential - it is necessary to sign the appropriate contract between the parties. This paper is about existing of legal shortcomings and how to overcome them in practice.

I. INTRODUCTION

On 13 of July 2007, that is nearly 10 years ago, Croatian Parliament passed the Data Confidentiality Act [in Croatian: Zakon o tajnosti podataka, further: ZTP] [1] which was in the matter of data confidentiality arranged on a fundamentally different level than the old Act on Protection of Data Confidentiality [in Croatian: Zakon o zaštiti tajnosti podataka, further: ZZTP] [2], back from the 1996.

The scope of the ZTP is defined significantly narrower than the scope of the old Act because the purpose of the ZTP is something essentially different. In fact, in the old Act from 1996 it has been stated that it "stipulates the concept, types and degrees of confidentiality and the measures and the procedures for determining, use and protection of confidential business information", and it regulates the state, military, official, business and professional confidentiality.

Unlike the above, Art. 1, para. 2 of the ZTP, which determines: "This Act shall apply to the state authorities, local and regional government, legal persons with public authorities and legal and natural persons, who in accordance with this Act, gain access or handle classified and unclassified information." [3]

The definition of classified and unclassified business information, in the art. 2 of ZTP, according to which, classified information is the one that the competent authority, (in the prescribed procedure), marked and determined by the degree of confidentiality. As well as the fact that the Republic of Croatia was handed by data from another state, an international organization or institution that the Republic of Croatia cooperates with. Furthermore,

unclassified data is data without the determined level of classification, which is used for official purposes, as well as the fact that the Republic of Croatia was also handed by data from another state, an international organization or institution that the Republic of Croatia cooperates with. ZTP harmonized categories of data confidentiality, in accordance with international safety standards (top secret, secret, confidential or restricted). [4]

For our presentation, it is important to emphasize the fact that the scope of the ZTP is limited on the information whose confidentiality is of public interest and the information without an established level of classification, used for official purposes. ZTP does not regulate the question of confidential business information.

In the ZTP's Final Proposal [5] it states: "This Act does not prescribe the terms of business and professional confidentiality, unlike the ZZTP (Croatian Official Gazette 108/96), since it is not common in the legislation of the most EU and NATO's member states. Therefore, the provisions from the Head 8 and the Head 9 will remain in force until this matter is not regulated by the other relevant laws."

ZTP's First Proposal had an interesting observation: "The confidentiality of data of legal and natural persons outside the state system (including private companies) is regulated by their own internal rules, especially within those companies who have their headquarters in the other countries and had already established a proper system of confidentiality of their data". [6]

However, except for certain adjustments of the Croatian Criminal Act [7], the new regulations have not been enacted. Therefore, the question of confidential business information in the Republic of Croatia is solved by the transitional provisions of ZTP and by the two heads of the old ZTP's, from 1996.

In more than 20 years, there has been a remarkable development of the high-speed Internet, as well as completely new business models, which include engagement of many business subjects, on one or several projects. Also, the business innovation and the 'know-how' is becoming increasingly important in today's modern business practice.

In short, questions of regulation and storage of confidential business information are getting more important regardless the fact that Croatian legal framework is based on several out-dated legal provisions. This deficiency is partly possible to be solved in practice – by the

quality agreements between business partners but it is necessary to be aware of this deficiency. Foreign business partners can come across this problem, during the fact that they are not familiar with the Croatian legal practice.

II. CONFIDENTIAL BUSINESS INFORMATION BY THE CURRENT REGULATIONS

ZZTP regulates confidential business information in the head VIII, in the articles 19 - 26.

According to this Act, the confidential business information is represented by the information which is defined by the Act of law, also other regulation or by the general company Act, or by the other legal entities, which represent confidential business information, results of research or construction work and other information whose disclosure to an unauthorized person could have harmful effects on its economic interests (ZZTP Art. 19, para. 1). Further, it states that the general Act cannot determine that all the information relating to the business of legal persons is considered for confidential business information nor can such information be in the contrary to the legal person's interests. (ZZTP Art. 19, para. 2).

In the Article 19, para 1, the legislator wanted to restrict confidential business information to the information that makes sense for declaring it confidential, and not for confidential business information to become a way of introducing police state for the economic subjects. [8]

Here we come to the first important provision related to the confidential business information – which must be stipulated. At the same time, the legislation adopted by the state is an exception - usually, confidential business information should be stipulated by the internal act of the organization (institution, company or association). If the organization fails to adopt such an act and if it is not systematic and appropriate to business organizations – then the whole concept of confidential business information cannot be applied.

By doing so, we must avoid the general rulebooks where the only guidance for confidential business information is: "everything that a responsible person declares as a confidential business information", because there is a high probability that at some changes of the extent and the type of business of the organization, part of the data remains unprotected.

The legal person is obliged to keep as a secret the information, which has been learned from the other legal entities (ZZTP's Art. 20, p. 1). The provision is obviously ambiguous: what's happening with the natural persons - sole traders and natural persons who are self-employed or who are employed by the service contracts? [8]

The question is: how can a legal entity know if the information that it received from other entities is indeed confidential. The simplest answer is - "it says on the paper" which would hardly be enough in the era before computers. If the relationship between the two parties includes access, processing of data which is confidential business information, it is necessary to sign an appropriate non-disclosure agreement (NDA). (see below)

ZZTP does not speak a lot about NDA, but because confidential business information is extensively described; it is giving a wrong message that this issue is resolved through legislation. As we have said, this is referred only to

the legal persons, but contemporary business often includes external teams of experts, freelancers and similar categories of non-classical legal persons. It is a failure of the legislator, however, originated in another time, because the complex forms of work from today were not common.

The ZZTP in its provisions if there is a proper general act, in which any legal person; (the Act forgot to add craftsmen and freelancers!); but more closely it regulates the issue of confidential business information in accordance with its business and needs.

General Act elaborates questions of confidential business information and in the Art. 21 of ZZTP it states, where it provides a framework for handling with classified information. The information that is considered confidential business information under The General Act can be transmitted to the other persons by the persons authorized and determined by The General Act (Art. 21, para. 1). Also, The General Act describes in detail the cases and the manner of protection when the above information may be disclosed to the other persons (Art. 21 para. 2).

The general "guidelines" are given on the information which is supposed to be described by the regulations of the legal person. The legal person will be determined by the authorized person or by the special body that has access to confidential business information, the task of their storage, and deciding which of the persons employed in that legal person could be authorized to keep those confidential business information, and to which persons' confidential business information could be told (Art. 21, para. 3).

The data that are considered as confidential business information should not be disclosed or made accessible to unauthorized persons, unless a special act provides differently (Art. 22, para. 1). The employees are obliged to keep the confidential business information if they find out an information that is the confidential business information (Art. 22, para. 2). That limits the ability for disclosure of the confidential business information by an informal communication.

The 24th Article of the ZZTP's consists of exceptions to the provisions which provide obligation of keeping the confidential business information. It is not considered a violation of the disclosure of the confidential business information to the natural or legal persons, to which, such information can or should be disclosed: 1) under the basis of this Act and other regulations, 2) under the authority which is resulting from the duties they perform, the position or the workplace where they are employed (Art. 24, para. 1).

Also, it is not considered as a violation of confidential business information the disclosure of information that are considered as confidential business information in the sessions, if for example, the communication as such is necessary to perform the work (Art. 24 para. 2). The authorized person (at the meeting), who discloses confidential business information should inform those present at the meeting that the information is considered confidential, and that they are obliged to keep the information confidential (Art. 24, para. 3).

The 25th Article of the ZZTP's stipulates that as a violation of confidential business information, it won't be considered as a statement that a person familiar with the confidential business information gives while reporting the crime, (also an economic offense or misdemeanour), to the competent body for the exercise of their labour rights.

The 26th Article of ZZTP's contains a general provision according to which a general act of a legal person specifies the method of administration and storage of information that is considered confidential business information, measures, procedures and other circumstances of keeping the confidential business information.

III. MARKING OF THE CONFIDENTIAL BUSINESS INFORMATION IN THE CROATIAN LEGISLATION

As already stated, ZTP's Article 34 has determined that by its coming into force, provisions of the ZZTP ceased to be valid, except of the provisions stated in the Head 8 and 9, provisions about business confidential information.

However, the manner of marking the business confidential information is not stated in the Head 8 or 9! How to mark that some information is confidential? In our opinion, it is necessary to apply the ZZTP's provisions which ceased to be valid, but the ones that are writing about marking the business confidential information.

According to the ZZTP's business confidential information has its own type and level. The 3rd Article of the ZZTP has determined, to the type of confidentiality, the confidential business information can be state, military, official, business or professional, and according to the level of confidentiality – state's confidentiality, top-secret, secret and confidential.

In accordance with the ZZTP's Article 5, para. 2, information representing the confidential business information can have level of business confidential information as 'top-secret', 'secret' and 'confidential' and they are marked by the appropriate mark, type or level of confidentiality. Therefore, to the ZTTP, the proper way of marking was: 'business confidential information – as top secret', 'business confidential information – as secret' or 'business confidential information – as confidential'. [8]

We can certainly recommend that such marking could be used today – for, it is simple and understandable, even if that part of the ZTTP is not in force. What can prove to be a problem - is that this is the authors' opinion, and as such the court in the case of a dispute, does not have to accept it.

IV. THE CONFIDENTIAL BUSINESS INFORMATION IN THE CRIMINAL LEGISLATION

The Republic of Croatia regulates the protection of confidential business information in the criminal legislation by very strict (long) prison sentences. In the Article 262 of the Criminal Act, it states that whoever, without an authorization, delivers or otherwise makes available any information that is confidential business information, or whoever collects such information with an aim of delivering it to an unauthorized person, will be punished by the imprisonment of up to three years. There is also much worse form of this criminal act - if the offender acquired considerable material gain for himself or for another, or caused a considerable damage, will be punished by imprisonment from six months to five years. [7]

In the same article, there is one exception – there is no criminal offense of disclosure and unauthorized acquisition of the confidential business information, if the offense is committed, predominantly in the public interest.

The stated criminal offense is prosecuted by the proposal. This means that the State's Attorney will not initiate proceedings *ex officio*, but in concern with the proposal of the injured party.

Naturally, the Criminal Act does not define what the confidential business information is - it only states that it should be defined by the other already mentioned acts, (by the separate act or the general act of the legal person's).

V. COMPARATIVE VIEW

Among other things, the ZTP's Final Proposal [5] states: "According to the criteria of comparative legislation, business confidential information isn't regulated together with the secrets of the state bodies sphere, but separately, and mostly within the framework of regulations on market operations. If we consider the practice of several relevant countries, it is only partially true. Austria has a dual model of protection of business confidential information.: "The Austrian Law provides for the protection of trade secrets prevalently in the Act against Unfair Competition, specifically in sections 11 to 13 but also in the Penal Code. These provisions are supported by the general clause according to section 1 of the Austrian Unfair Competition Act. Also, Sections 11 and 12 are provisions of criminal law. The general nature of these provisions is the disclosure or exploitation of trade or business secrets, that have been entrusted to the offender during a professional occupation, or which have been obtained by espionage. The penalties in question are imprisonment or fines. The legal values protected under this framework are the legitimate interest in the confidentiality of trade and business secrets and to punish infringements of such legitimate interests." [9]

A similar solution is offered by the United States: "In contrast to other types of intellectual property (trademarks, patents, and copyrights) that are governed primarily by federal law, trade secret protection is primarily a matter of state law. Thus, trade secret owners have more limited legal recourse when their rights are violated. State law provides trade secret owners with the power to file civil lawsuits against misappropriations. A federal criminal statute, the Economic Espionage Act (EEA), allows U.S. Attorneys to prosecute anyone who engages in "economic espionage" or the "theft of trade secrets." The EEA's "economic espionage" provision punishes those who misappropriate trade secrets with the intent or knowledge that the offense will benefit a foreign government, instrumentality, or agent." [10]

The Federal Republic of Germany has solved this issue through several regulations, primarily through the Unfair Competition Regulations but also through the labour regulations, which does not exclude criminal liability. It is interesting that there is a special obligation of keeping the information of the other side, in case of business negotiations. [11]

It is obvious that also in the other countries there is a considerable disagreement over the legal protection of business confidential information. It is regulated by the Regulations of Competition's Protection, by the Civil Code, but also by the system of Criminal law. Considering that numerous business ventures are supranational, it represents pre-regulation. It should be taken into

consideration that the perpetrators (especially those for the first time) were condemned on parole or short prison sentences, which in practice is proven to be troublesome. [12] *De lege ferenda*, it should be advocated that the business confidential information issue remains within the civil liability for damage.

VI. A NON-DISCLOSURE AGREEMENT

A non-disclosure agreement (further: NDA), also known as a confidentiality agreement is a private contract, which is used for keeping and saving valuable information. It can be of a great benefit for researchers and organizations that are involved in research and development projects. NDAs' are legally binding, for determining the conditions under which one party is (the 'discloser' of information), the one who reveals confidential business information to another person (the 'recipient' of the information). In doing so, one party provides information, and the other party receives the information. Depending on the number of parties who share information, NDA can be unilateral, bilateral or multilateral.

For an NDA to become valid, in Croatian legal system, it is not required to be verified by a notary public, but the signature of the contracting parties is sufficient, (in case of organizations, the agreement should be concluded by the authorized representative/s). Other than mentioned, the ZZTP (in the Head 8), is familiar with the protection of confidential business information, but there is no NDAs' in Croatian legislation.

Any information which may not be in public domain, or generally known, may be protected by a non-disclosure agreement. It can protect any sort of confidential information like: a concept for a new restaurant, a new business venture, or any sort of confidential business information that could be of value to others if it was disclosed. [13] Additionally, confidentiality agreements should contain a provision stating that no implied license to the technology or information is to be granted to the recipient and that all tangible embodiments of the information (e.g., models, data, and drawings) should be returned upon request and in no event later than the end of the agreement term, and that no copies shall be retained by the recipient. [14]

In conclusion, there are several situations where a confidentiality agreement is appropriate and may be proposed. Knowing a few basic points concerning confidentiality agreements can ensure that the important purposes they serve will not be defeated by ambiguities or ignorance of the meaning of terms used in the agreement. [14]

VII. CONCLUSION

The confidential business information in The Republic of Croatia is, therefore, defined by the 1996 ZTTP's, and by the provisions of the Criminal Act. At first glance, one might conclude that it is extensively regulated by the acts of public authorities.

However, after a review we have given in this paper, it can be concluded that the entire state regulation concerning the confidential business information in Croatia is deficient. It is based on the over 20 years old provisions of the ZTTP, which are applied based on the transitional provisions of the

ZTP from 2007, and partly by an outdated criminal legal liability (the issue of confidential business information in the developed countries, mainly lays within the scope of civil liability for damage).

This regulation gives only an illusion of protection of the confidential business information - so it could easily be said that it is even harmful, in practice. Therefore, for all, that are doing business in Croatia and want to protect their information, we recommend that they primarily do:

- a) their own quality act on the protection of business information;
- b) the signing of an appropriate NDA agreement with their partners (standardized, or if necessary, custom),
- c) Signing NDA agreements with external partners (individuals, craftsmen, freelancers).

Also, it is necessary to inform its own staff about confidentiality and ask them confirmation and familiarity with the same.

Only, if the organization does its own measures then it can partly rely on the national system of protection of business information.

In the end, we emphasize that this legal system of protection of confidential business information, literally represents a rarity in the world, so it is important to familiarize foreign business partners in businesses which include confidential business information.

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