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PROTECTION OF EMPLOYER'S CONFIDENTIAL INFORMATION IN THE INDIVIDUAL AND COLLECTIVE LABOUR LAW

Abstract:

As a result of civilization changes the role of information is increasing. Nowadays information is the more and more important element of an enterprise. That process is reflected in law change. The Author will analyze regulation concerning protection of confidential data of the employer in the context of European Law and its influence on Polish law.

Regulations concerning information are present in individual and collective labour law. In the individual labour law protection of confidential data concerns information the employee acquires due to performing of his duties. In collective labour law, number of employee representatives have right to demand from the employer information. These refers to labour unions, works councils, European works councils, employee representatives in the European Company, European Cooperative Society and in the company resulting from the cross-border merger have brought information rights.

Giving the right to information needs at the same time introducing mechanisms of protection of employers' confidential data. In this context it is worth to examine what are the possibilities of enforcement the employer's duties concerning information and protection of confidential data and what is the liability for violation of confidentiality.

The main goals of the paper is to:

• analyze the legal considerations regarding employees and employees' representatives access to the information about employer operation and to show the legal means of protection of those data,

• analyze the influence of access to the information and protection of those information on the effectiveness of employees' representation,

• compare the information rights and protection of employer confidential information in the case of different employees' representations and defining level of cohesion of this regulation,

• giving recommendation aimed at improvement of the regulation in the scope of information and protection of employer' confidential data in the individual and collective labor law.

Keywords:

labour law, confidential information, employee representatives.

1.* Information is the resource of the company. Its role increases with the civilisation changes. The nowadays used term of “the economy based on knowledge” highlights the importance of information as the primary factor determining the success of the company. Information has become an important economic resource, which should be properly managed and which requires protection. It has often been said that knowledge is to the economy of the 21st century what coal was to that of the 19th century and oil to that of the 20th century (OECD, 2013, p.180).

Over the past decades, the information resources of companies has become particularly vulnerable to violation. The reasons for this phenomenon can be sought in the development of technology and globalisation, which affected the increased competition between companies, what can favour unfair market practices within obtaining information. The factor increasing the risk of their unauthorised use is also the more extensive use of outsourcing[1]. Additionally, development of technology itself facilitates the unauthorised acquisition and use of information[2]. It no longer requires substantial investment of time or resources. The increase of risk of unauthorised information use is also affected by the facilitated mobility of employees, as well as the fact that currently it is much easier for the employees to start the competitive business towards the employer. Starting your own business often does not require the involvement of significant financial resources, and the activities of the company based on knowledge and experience obtained from the previous owner can constitute a serious threat for him, especially because small companies can faster respond to the demand of the market in the dynamically changing realities. The growing importance of information and the interrelated growth of risks connected to their unauthorised use is reflected in studies conducted among entrepreneurs[3].

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[1] For more information see S. Baldia, *Intellectual Property in Global Sourcing: The Art of the Transfer*, „Georgetown Journal of International Law” no. 3 from 2007.

[2] For more information see: Institute of Law Research and Reform and a Federal Provincial Working Party, *Trade Secrets. Report No 46*, Admonton 1986, p. 40, http://www.alri.ualberta.ca/docs/fr046.pdf, as of May 31, 2015.

[3] Unauthorised access to information is perceived by them as one of the most serious disruptions in the company activities (Data according to PricewaterhouseCoopers, *Information security breaches survey. Technical report*, 2012, p. 16, http://www.pwc.co.uk/en_UK/uk/assets/pdf/olpapp/uk-information-security-breaches-survey-technical-report.pdf, as of March 2, 2015). Data developed for the European Commission in 2012, based on interviews in more than a half thousand enterprises in the EU, indicate that 20,5% of them admitted that within the last 10 years they fell victim to actions aimed to unauthorised acquisition of confidential information (In the report prepared by Baker&McKenzie for the European Commission – *Study on Trade Secrets and Confidential Business Information in the Internal Market*, 2013, http://ec.europa.eu/internal_market/iprenforcement/docs/trade-secrets/130711_final-study_en.pdf, as of March 13, 2015). The scale of threat for the compant in connection with the unauthorised use of confidential information is illustrated by high-profile cases of these types of matters involving the companies, such as Michelin, Formula 1 teams – Force India or Ferrari, as well as the financial institution Societé Générale (cases of violations in the scope of confidential information were presented during the conference organised by the European Commission on July 29, 2012, which retransmission is available online at: https://scic.ec.europa.eu/streaming/index.php?es=2&sessionno=007ff380ee5ac49ffc34442f5c2a2b86, as of March 13, 2015 see also *Commission Staff Working Document Impact Assessment accompanying the document proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure*, SWD (2013) 471 *final*.).

The subject of this article is to outline the key issues related to the protection of employer's confidential information in relation with employees and employee representatives in European and Polish law. The specificity of protection of confidential information in labour relations stems from the fact that admission to that information of employees is a prerequisite for the use of information for the purposes of the employer's business. The basic problem regarding the protection of confidential information in labour relations, therefore, is how to ensure protection of employer's confidential information, at the same time making them available to employees and their representatives. It should be noted that the employer has a duty to provide information regarding his activity to employees' representatives, which also result from the requirements of the European law.

The problem of protecting employer's confidential information requires separate consideration on the basis of individual labour relations and in relations with employee representatives.

2. On the basis of **individual labour law** first the attention should be paid to the fact that the employer, who properly takes care of his interests, should undertake organisational and legal actions to determine the scope of confidential information, as well as to instruct employees on their obligations regarding the protection of such information. Serious evidence difficulties in cases concerning the disclosure of confidential information compel employer's actions directed towards the prevention of violations. The employer should determine the rules of processing information in internal company acts, including the principles of using the communication tools by the employees.

Under the Polish law, in my opinion, the need to protect employer's confidential information is a sufficient justification to take control measures against employees, including the monitoring of rooms and electronic communication. As a rule, employees should be advised of the possibility of the employer's control, however the necessity to prevent or detect a crime related to the use of employer's confidential information can justify such action without prior notice. The concern for protection of employer's confidential information can therefore justify his intrusion in the sphere of legally protected interests of employees, including – maintaining proportionality – in their privacy.

In addition to organisational and control activities, the contracts with employees are also the means of protecting confidential information. An example is the non-competition agreement, which directly relates to the ban on the employee's entry into market rivalry with the employer, but it indirectly affects the employer's confidential information protection, prohibiting the employee's use of confidential information for purposes other than the implementation of the employment contract. The confidentiality agreement is a product of practice, clearly unregulated under the Polish law. The main aim of such an agreement is to extend the period of the protection of employer's secrets over the duration of the employment relationship. Under the Polish Labour Code[4] the employee is obliged to keep the secrets of the employer only during the employment relationship, and at its dissolution only the

[4] The Act of June 26, 1974 Labour Code (Journal of Laws 2014.1502 consolidated text, as amended), hereinafter referred to the Labour Code.

information being the trade secret are protected against unauthorised use, within the meaning of the act on combating unfair competition[5].

3. One of the major challenges concerning the employer's confidential information protection in relation to an individual employee is the separation of employee knowledge, his experience and skills, which he can freely use, from employer's confidential information, from the unauthorised use the employee should abstain himself.

This issue gets particular importance just after the termination of employment relationship. The employee, according to the principle of freedom of work, can continue professional activities, drawing from his knowledge, which element is also the experience gained with the previous employer. At the same time the protection of the trade secret by law exceeds the time frame of the employment relationship, obliging the employee to refrain from disclosing confidential information of the previous employer even in a situation, when there are no legal obstacles to undertake work at the competitor of the previous employer or to undertake competitive activity within own business activity. The question is whether, in practice, in general it is possible to perform the competitive activity against the former employer without using the legally protected information as his company's secrets. This gap is filled by the doctrine which comes from the American legal system, so-called **inevitable disclosure**. The foundations of this notion of law have been developed in the case of *PepsiCo, Inc. v. Redmond*[6], which concerned an action of the employer against the former employee undertaking employment in the competitive company. This employee was not bound by non-competition agreement after termination of the employment relationship, but he has signed a confidentiality contract. The court considering the case has ruled that the plaintiff can effectively assert his claims related to the misuse of confidential information, if he shows that the performance of obligations with the new employer will inevitably lead the employee to revealing confidential information obtained in relation to the previous employment. When examining the circumstances, which justify the limitation of the former employee in undertaking employment with a competitor based on the presumption of unauthorised use of secrets of the former employer, we should take into account factors like: existence and scope of competition between the former and new employer, similarity of employee's obligations within the former and new employment relation, value and adequacy of secrets owned by the employee for the new employer, industry conditions, efforts of the new employer undertaken in order to respect secrets of the former employer, manifestations of intent of the former employee and new employer. Since the decision on *PepsiCo, Inc. v. Redmond* a

[5] The Act of April 16, 1993 on combating unfair competition (Journal of Laws 2003.153.1503 consolidated text, as amended).

[6] *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995), the case was resolved by Court of Appeals, District 7. The judgement is available on: http://www.eejlaw.com/courses/patent_spring_06/materials/Pepsico_v_Redmond.pdf, as to 10 November 2014. Even before the verdict, as early as 1902., Court prohibiting an employee working for a competing company, referred to the fact that the exercise of the new employment may violate secrets gained by the employee in connection with a previous employment; see. J.S. Klein, G. Silbert, *The Inevitable Disclosure of Trade Secrets: The Rebirth of a Controversial Doctrine and Where the Courts Stand*, http://apps.americanbar.org/labor/lel-annualcle/09/materials/data/papers/055.pdf, as to 31 July 2015.

series of judgments have been issued based on the doctrine of *inevitable disclosure*, however it is not applied uniformly, and some state courts reject it completely[7].

In the Polish legal system there is no reason to limit the employee in making a competitive activity in a situation, when he is not bound by non-competition agreement after termination of employment. In the Polish law the only effective tool of the employer to protect own secrets after termination of the employment thus is the conclusion of the non-competition agreement with the employee. Confidentiality agreements encountered in practice after termination of employment relationship can partially protect the interests of the former employer, especially if it has claimed contractual penalties.

4. However, the protection of employer's information does not have the absolute nature and requires limitation due to reasons of law. Employees allowing the disclosure of employer's confidential information in order to discover irregularities, which he committed, are the so-called **whistleblowers**. Although in some countries already the special regulations have been introduced, which refer to this phenomenon, still in most countries this issue remains unregulated[8]. There is no single, universally accepted definition of whistleblowing. This term has not been defined in acts of international law, and even in countries which have introduced regulations regarding the protection of whistleblowers, usually such definitions are lacking[9]. Undertaking the attempt to define the term of whistleblowing, it should be

[7] R.M. Wiesner, *A State-By-State Analysis of Inevitable Disclosure: A Need for Uniformity and a Workable Standard*, 16 „Intellectual Property Law Review" nr 1 z 2012 r., s. 211, http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1187&context=iplr, as of November 10, 2014.

[8] In the United States, currently, the main act on whistleblowing is Whistleblowing Protection Act of 1989. Some employees of the private sector are on the other hand covered by specific laws, like Sarbanes Oxley Act of 2002, imposing international corporations with the participation of American companies or listed on American stock exchanges the obligation to establish internal procedures concerning whistleblowing, and in most states separate acts were introduced referring the protection of whistleblowers. In Europe most countries did not introduce the specific legislation on the issue of whistleblowing. In Great Britain in 1998 the act of Public Interest Disclosure Act was introduced, http://www.legislation.gov.uk/ukpga/1998/23/contents, as of May 5, 2015. Also Romania introduced the act a whole devoted to the issue of whistleblowing – cf. act no. 571/2004 of December 14, 2004, Official Gazette No. 1.214 of 17 December 2004, the text of the law in English available at: http://www.whistleblowing.it/Romanian%20Law%20571-2004%20-%20whistleblowingEN.pdf, as of February 25, 2013. More on whistleblowing in experiences of the selected countries, see M. Derlacz-Wawrowska, *Whistleblowing and protection of employer's confidential information*, in: *Labour Law. Reflections and search. Jubilee Book of Professor Jerzy Wratny*, Warsaw 2013, p. 390–403.

[9] As a starting point we can indicate definitions provided by representatives of non-government organisations undertaking this topic. Guy Dehn, director of the British non-government organisation of Public Concern at Work, who has developed the report for the European Commission in this matter, has formulated the following definition: "notifying authorities about information, which rationally suggest that the case of serious abuses has taken place, while such information is not commonly known or easily accessible and when the person, who reveals the information (like, e.g., an employee),is obliged to maintain confidentiality"; see. G. Dehn, ed., *Whistleblowing, fraud & the European Union. An analysis of the laws and practices in Europe which affect attitudes toward*, London 1996, http://www.pcaw.org.uk/corruption-fraud-papers, as of February 25, 2013. . The literature also suggest the following definition: "*Whistleblowing* is the disclosure made by a member of the organisation (former or current) regarding the non-legal, immoral or illegal practices performed with the knowledge of the employer. It involves informing people or organisations, which have the power enabling the power to influence the proceedings of people or organisations"; see M.P. Miceli, J.P. Near, T.M. Dworkin, *Whistleblowing in organizations*, New York 2008. Such a definition is also

noted that substantially all of the common definitions agree on the fact that the phenomenon of whistleblowing relates to people (mostly employees) obliged to maintain confidentiality in relation to the legal relationship connecting them with the organisation, in which irregularities occur, and that they reveal the information in the broadly understood public interest. These basic elements are expanded by another ones, among which we should point out the action of the whistleblower in good faith and disclosure of information in order to combat irregularities to the authorities, which have the competence and means to take action to eradicate the reported deficiencies. The key legal issues that are associated with the phenomenon relate to the limits of acceptability of whistleblowing and protection of whistleblowers against repercussions from the employer. The legal loophole concerning admissibility and requirements justifying the action of whistleblowers also threatens the interests of employers. In the wider context the legal regulation of the phenomenon of whistleblowing could also have a positive effect on the development of pro-social attitudes.

5. Going to the issue of protection of confidential information in **collective** labour relations, it should be noted that the problem of protection of employer's confidential information in relations with representatives of employees in general was noticed by the European legislator, who along with the equipment of the employees' representatives with powers to obtain information from the employer, predicts the rules for protection of employer's confidential information.

The European law introduced a number of regulations requiring employers to provide information to employees. Originally they were partial regulations concerning information of employees in case of specific events like collective redundancies[10] or transfer of undertaking[11]. Along with the progressive equating social and economic integration objectives (*cohésion*), more comprehensive regulations in informing employees were introduced, including the specification of employees' right in economic organizations operating in at least two EU countries[12] and afterwards, the general conditions of informing and consulting employees on a national level [13].

provided by Transparency International; por. M. Worth, *Whistleblowing in Europe. Legal Protections for Whistleblowers in the EU*, Berlin 2013, http://files.transparency.org/content/download/697/2995/file/2013_WhistleblowingInEurope_EN.pdf, as of May 4, 2015.

[10] Council Directive (EC) 98/59 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L 225, 12.8.1998, p. 16–21.

[11] Council Directive (EC) 2001/23 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p. 16–20.

[12] European Parliament and the Council Directive (EC) 2009/38 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) [2009] OJ L 122, 16.5.2009, p. 28–44 (EWC Directive); Council Directive (EC) 2001/86 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L294, 10.11.2001, p.22–32 (SE Directive); Council Directive (EC) 2003/72 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees [2003] OJ L 207, 18.8.2003, p. 25–36 (SCE Directive).

[13] European Parliament and the Council Directive (EC) 2002/14 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L 80, 23.3.2002, p. 29–34.

Employees' right to information about the employer's business is part of the participation of the employees in the management of the company[14]. Transmission of information to employee representatives, even when it is not associated with the formal right of employees to give consent, or even opinion about intended action of the employer, it has an impact on its activities. Informing also has an instrumental function toward other forms of employees' participation - consultation and co-decision. Transfer of information is a prerequisite and a starting point for carrying consultations and reaching an agreement.

Employees' rights to information and consultation are the standards of European law. They are guaranteed in a number of fundamental EU documents, including Treaty on European Union as amended by Amsterdam Treaty of 1997[15], Community Charter of the fundamental social rights of workers of 1989[16], Charter of Fundamental Rights of the European Union, which is now an attachment to the Lisbon Treaty of 2007[17]. In the European legislation process of forming representations of employees and developing their participatory rights continues.

Employees' right to information about the employer's business is performed in principle by their representatives, and only in the absence of representatives, information is provided directly to the employees[18]. The employee representatives entitled to receive information includes especially European Works Councils[19], works councils, employee representation in European Company (*Societas Europaea*, SE) and European Cooperative Society (*Societas Cooperative Europaea*, SCE). The scope of the employees' representatives access to information concerning the activities of companies is set by regulations establishing these employee representatives or agreements with employer concluded under these regulations. The information to which access was granted to employees is wide and indeterminate. For example, European Works Councils can demand the following information that the company is obliged to provide: information on the structure, economic and financial situation, probable development, production and sales, situation and probable trend of employment; investments; substantial changes concerning organization; introduction of new working methods or production processes; transfers of production; mergers; cut-backs or closures of undertakings, collective redundancies.

[14] Participatory solutions can be classified according to forms (degrees) of participation. Information unrelated to the additional power to influence the decision-making process is the weakest form of participation. Higher form of participation rights are advisory and consultancy powers of employee representations (cooperation). The highest, most developed and most rare form of participation is co-decision, which is to give the workers' representatives decisive voice in the decision making process in the company. J. Wratny, "Employee participation. Study of the issue in conditions of the economic transformation" (Warsaw: IPiSS 2002) 26-27.

[15] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340, 10.11.1997, p. 1–144.

[16] Community Charter of the fundamental social rights of workers, adopted at the European Council meeting held in Strasbourg on 9 December 1989.

[17] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon [2007] OJ C 306, 17.12.2007, p. 271–271.

[18] e.g. art. 7 section 6 Council Directive (EC) 2001/23 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p. 16–20.

[19] In 2013 there were 1048 EWCs functioning, European Trade Union Institute, EWC database, 11/2013, http://www.ewcdb.eu/documents/freegraphs/2013_11_EN.pdf, access on 8.03.2014.

As already mentioned, the European legislator, granting employees certain rights to information, also notes the need to safeguard the resource of information of the employer. In this regard, regulation relating to works councils, European Works Councils, and employee representatives in the SE and the SCE is very similar. The pursuit of protection of the information concerning the employer is manifested in the possibility to impose confidentiality duties on employee representatives in regard of certain information[20]. Information provided to employee representatives with confidentiality clause may serve them in the course of the consultation or can form the basis for decisions making in directing their further actions. Other instrument to protect information of the employer is the possibility to refuse to provide some information, which generally are covered by information duty[21]. This concerns especially sensitive information when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertakings concerned or would be prejudicial to them. The scope of information to employees is therefore dependent not only on the range of issues which, under the laws or agreements, have been recognized as a matter of information, but also the sole decision of the of the employer. Under the provisions of national legislation, the decision of refusal to provide information may subject to prior administrative or judicial authorisation. In Poland, the decision of the employer not to disclose information, like the decision to provide information on a confidential basis, is subject to judicial review.

As a result of the European law, regulations concerning the above-mentioned information rights of the employees' representatives have been moved to the Polish law. Thus, these representations obtained the access to information about the employer's activity, which under the Polish law have so far been fundamentally reserved for trade unions. After analysing the regulations relating to the protection of employer's confidential information in relations with trade unions and non-trade employee representations there is a conclusion that for representations having their genesis in provisions of the European law the regulation concerning the access to information and protection on employer's confidential information is much more extensive than in case of trade unions. It should be noted in particular that assigning specific tasks to unions is accompanied by granting them competence to demand information from the employer relating those tasks. At the same time, regulations on information powers of trade unions are general. Provisions regarding trade union right to information only exceptionally provides for obligation to protect the information[22]. On the other hand, also the legal means determination is lacking, which the trade union could use in order to enforce the needed information. *De lege ferenda* these issues should be regulated, what would contribute to avoid conflicts against this background, and would affect the strengthening of protection of employer's confidential information.

In relations with representatives of employees, protection of employer's confidential information experiences significant limitations. This consists of the fact that the confidentiality obligation falls on every representative individually, and the representation as such (with the exception of trade unions, which has legal personality, can bear liability for violating confidentiality of information obtained from the employer) does not bear liability for the violation of the confidentiality obligation.

[20] See art. 8 of EWC Directive, art. 8 SE Directive, art. 10 SCE Directive.
[21] See art. 8 sec. 2 EWC Directive.
[22] For example art. 241^4 of the Labour Code.

The employer providing information to the group of employees' representatives in the even of a breach of confidentiality faces the necessity to prove which person in particular committed such an infringement. The employer's position is additionally weakened in a situation, when the worker representation consists of people, who are not in the employment relation with him, what can take place, e.g., in relation to EWC. Against such people the employer is left with the civil way of pursuing claims.

6. In conclusion, it should be noted that the subject of protection of employer's confidential information is extremely broad and multi-faceted issue, which legal regulation *de lege lata* is partial and inadequate in many ways. The comprehensive presentation of all theses and conclusions associated with the subject was not my goal. However, I hope that the issues raised will be the inspiration for further studies, which in labour relations is constituted by the protection of employer's confidential information, especially since it seems that the economic development and growth of information significance will affect the development and clarification of regulations on the protection of confidential information also in labour relations.

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