Faced with the challenges relating to the increased occurrence of theft of sensitive business information, misappropriation of know-how and the lack of uniform legislation in the Member States, several years ago, the European Commission focused its attention on the sensitive issue of trade secrets protection which was intended to protect the competitiveness of European undertakings. The procedure which started as far back as 2013 was successfully completed with the adoption of the long adopted and much debated Directive EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information trade secrets) against their unlawful acquisition, use and disclosure ('the Directive"). Member States are required to transpose the Directive and to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 9 June 2018.

The objective of the Directive is to achieve uniform protection at the EU level and to overcome the lack of such protection where the relevant intellectual property does not meet the statutory criteria for a patent or copyright.

A major issue in the drafting of the Directive was the scope of the term "trade secret". The definition proposed by the Commission comes very close to and is undoubtedly inspired by the definition of "undisclosed information" which is laid down in Article 39 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) representing Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization, which entered into force for the EU in accordance with Council Decision 94/800/EC. This definition reads that information is considered to be undisclosed as long as such information: "(a) is secret in the sense 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; (b) has commercial value because it is secret; and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret".

Article 2(1) of the Directive reads that information considered to be "trade secret" means information which meets all of the following requirements:

(a) it is secret in the sense that it is not, as a body or in the precise configuration and

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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;

(b) it has commercial value because it is secret;

(c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

In accordance with the Directive, 'trade secret holder' means any natural or legal person lawfully controlling a trade secret, while 'infringer' means any natural or legal person who has unlawfully acquired, used or disclosed a trade secret.

The Directive defines the acquisition of a trade secret as lawful when the trade secret is obtained by any of the following means:

(a) independent discovery or creation;

(b) observation, study, disassembly or testing of a product or object that has been made available to the public or that is lawfully in the possession of the acquirer of the information who is free from any legally valid duty to limit the acquisition of the trade secret;

(c) exercise of the right of workers or workers' representatives to information and consultation in accordance with Union law and national laws and practices;

(d) any other practice which, under the circumstances, is in conformity with honest commercial practices.

On the other hand, the acquisition of a trade secret without the consent of the trade secret holder is considered unlawful, whenever carried out by:

- unauthorised access to, appropriation of, or copying of any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced;
- any other conduct which, under the circumstances, is considered contrary to honest commercial practices.

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Furthermore, the use or disclosure of a trade secret is considered unlawful whenever carried out, without the consent of the trade secret holder, by a person who is found to meet any of the following conditions:

- having acquired the trade secret unlawfully;
- being in breach of a confidentiality agreement or any other duty not to disclose the trade secret;
- being in breach of a contractual or any other duty to limit the use of the trade secret.

The measures, procedures and remedies applicable to trade secrets in accordance with the Directive and some comments on the existing Bulgarian legislation and the legal means necessary to make it compliant with the new EU requirements will be the subject-matter of a further publication.

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