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FROM CONFIDENTIALITY TO WORK PRIVACY – A TRANSFORMATION IN A PERSON'S RESPONSIBILITY

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Abstract: *The confidentiality clause and the service secret are two means coming from different branches of law, public and private, but they have the same goal – to protect information, the component of a person's patrimony, which is a more and more important issue in the world we live in. The protections provided by the two ways are different in terms of the gravity of the penalty they may involve and for this reason they may be used with discrimination, proportionally with the importance of the protected object. But in the present conditions when the information is sancta sanctorum, only this responsibility in punishment tends to dim, those interested in providing the protection of information seek for most effective and efficient punishment.*

Keywords: confidentiality, clause, service, secret, patrimony, person

1. Introduction

Knowledge is power – it seems that Ali, the first Shiite imam, said it in his work entitled Nahj al-Balagha [1]. This idea was also issued by Francis Bacon, Thomas Hobbes and Thomas Jefferson. Even though some may consider that through knowledge, in the meaning given by the author of the text from which the previous quote was extracted, one understands only the educational process, be it religious or secular, modern times seem to assimilate knowledge with the longer process of accumulation and preservation of information. We also tend to assign the term its broader meaning. The accumulation of information is not the object of our study. Instead, what is the object of our analysis is the process second part – the preservation of the information. One way of preservation, meaning protection, is forming the liability of all operators of this kind of information, of the people who intend to get in touch with this kind of information, of the people who intend to preserve their own patrimony or to extract from other's patrimony. Indeed, the same modern times have brought the developing of many kinds of abstract entities, for instance the various forms of organization of legal entities but the information operations still remain the attribution of individuals, being those who possess and manipulate the information, the legal entities having only the utility and functioning of some official vehicles. If we abandon the present to the past eras, it can be noticed that state legislators have always tried to protect the information through harsh penalties. Coming back to present we observe that the outsourcing of some governmental services to some people of private right had as a consequence the extension of the subjects' multitude who will have the responsibility for acting in relation with the illicit information processes. It cannot be denied that some

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institutions of right and juridical concepts, like the bank secrecy or economic secrecy, have been coexisting temporally with state secrecy forming in this way two separate domains of information which needed to be protected. The distinction between these domains, state and private, comes from the nature of the protected object and of correlative liability. It is interesting how, eventually, the objectives of the two information domains, becoming somehow common to the people interested in protecting them, caused a sort of unification of the liability of the people who were to be sanctioned for not respecting the protection to which they had been previously obligated through various legal means. If, at the beginning, the negative characters of the civil relationships who had as object the private information were only financially punished, by transferring their financial goods to those who were damaged, then, by the intervention of national or even international legislators, the sanction has become more complex, including the deprivation of liberty, which at the beginning was only in the benefit of the state information protection system. This kind of aggravation of personal liability is easily noticed if national law is compared with secret service law regarding privacy, comparison that we will further analyse, among many other things.

2. About the Privacy Clause

The obligation of confidentiality is an institution of labour right, provided as a conventional possibility in art. 20 and 26 from Labour Code. As in the cases of other specific clauses of the individual labour contract, the privacy clause is generated by negotiation and the approval of the parts, and it will be introduced in the material instrument of the common will, the contract being a written document signed by both parts. Of course, a clause like this is not important for our demarche because this kind of omission deprives the contract of the wanted effects in our research. In most cases, the form, the content, or the length of this clause are imposed by the employer, who is the most important person of the scenario set at work, although the relevant legislation, because of its lack of distinction at the normative level, would allow the employee to bring his/her own contribution to the text by drawing up and to the tone of the punitive results, if activated. It is somehow normal to be an imbalance in the clause drawing up and in the administration of further effects because, given the fact that, in practice, the cases in which the employee wants to protect anything else but his/her personal data written in the labour individual contract are extremely rare, the employer is the one who wants to form a contract frame as protective as it may be, this part being the one that supplies most of the personal information of the employee that must not be revealed. The same normality is expected in the situation in which a second volume of information, different from the one received from the employer, is generated by the employee's activity. In practice, two types of privacy classes emerge: (i) the first, brief enough, but drawn up in a general manner so that it may lead to the establishing of a vast sphere of protected information, and (ii) the second, having the role of a reference clause, through which the information sphere, which needs to be protected, is regulated inside various intern regulations, labour collective contracts, etc. In the case of this type of clause, the employee practically gives up his/her hypothetical right to influence the form and the effects of the confidentiality clause, agreeing, by signing the labour individual contract, with the unilateral future decision of the employer. The effects that such a clause generates are: (i) permanent ones, of guiding the employee's behaviour to the permanent insurance of the protection of the employer's information patrimony, and (ii) latent ones which are activated, generating the repression, when the debtor of the confidentiality obligation, and of the protection of privileged information, infringes it by divulging it. Generally, the

way of divulgation and the persons that receive the information are irrelevant to the parts of the labour individual contract. What is important is that some of the private information got to others irreversibly. The number of these people or the possible reversibility of the information transfer is not important for the clause effects, its realization conditions being accomplished when the disclosure happened. The non-observance of the confidentiality clause and the information spill, the protected object, in the other persons' patrimony is financially punished following the damage – interests' way. The state legislator did not interfere at the contract level of the parts but he established the application of the legal institution of the damage – interests as a way of sanctioning and repairing, after which the parts and possibly the courts determine the extent of the employer's damage and, at the same time, the penalty for the disloyal employee for his/her injurious action.

3. About Work Secrecy

The information protection requires a total new dimension when the information is classified as work secrecy. Work secrecy is an institution of private right, provided as the possibility of intern settlement by art. 31 and the following ones from Law no. 182/2002 regarding the protection of classified information. We will further explain how this legal concept can be extended to situations which were not foreseen by the legislator. If taken the case of information which is protected by a confidentiality clause, both parts of the labour individual contract could theoretically bring their contribution to the contract by drawing up and make it efficient. In the case of the declaration and content of the information which is classified as work secrecy, this power attribute belongs to the employing legal entity, more exactly to its leader [2]. Taking into account the purpose of the normative act, which integrates within the same text the most important concept of state secrecy, we find this perspective on the legal entity unsurprising, the premises of this settlement being close to the hierarchical military organization. It can be noticed that, if given the case of the labour individual contract, the employer is regarded as a legal entity, the executive agent, its representative, but not being important. In the situation of the work secrecy, the information character, its circuit restrictions is exclusively the attribution of the employer's leader regarded as a distinct person of the legal entity which he/she leads. Probably the national legislator has not considered the possibility in which the leader of the legal entity is actually a collective authority, such as a board of management or an executive board. Still, we believe that the usage of the singular does not prevent the extension of the secrecy attribute to this kind of authorities or to the designation of an individual for this sort of operations. If the two types of confidentiality clauses recently mentioned have the purpose to extent the information sphere by following the used terminology, which, as we were saying, tends to be larger and more general so that in the case of an eventual juridical interpretation, it could assure a total triumph for the employer and a maximum financial responsibility for the employee, the sphere of work secrecy is outlined by the summing of all classified information distinctively taken. In other words, the work secrecy represents the quantum of the information which has been individually classified by the leader of the legal entity. So, in order for such a note to exist, at least a piece of information has to be classified as work secrecy [3]. There are rare situations in which the confidentiality clauses establish a way of addressing or a group of persons among which the protected information is tolerated and encouraged. In the case of work secrecy, they went further so that the classification object could be limited in circulation to a precise number of persons, according to their functionality within the organization of the legal entity in which they work.

There are also rare situations in which the confidentiality clauses distinguish between the various degrees of guilt which could be incident as a result of the purpose, the dangers awareness or the means used by the operator of the information. In the case of work secrecy, the legislator has considered as penalty the lowest and the most tolerable threshold of this culpability stratification – the negligence [4]. We have previously highlighted that the damage – interests' payment represents the punishment for breaking the confidentiality obligation. The penalties for the same actions or omissions directed against the information, which have been declared work secrecy, are more numerous and of different kinds. These are – disciplinary, contravention, civil or penal ones, as it was established by the parts of the labour contract or by the legislator for emergency cases. As it can be seen, the damage – interests penalty, in the case of confidential information is retrieved in the case of work secrecy too, and it can be included in two of the previous categories: disciplinary and civil. Following up, we will refer only to a example of a rule of criminal law, which we find as having such a large covering area that it can be applied in the situations which even the legislator did not think of when he/she drew it up. At present, the threat of divulgation of work information comes from the stipulation from Penal Code [5]. This law guarantees the protection of two sets of information: (i) secret work information, and (ii) information which is not for publicity. We recognise the necessity of criminal penalty even for the negligence in the management of work secrets but we ask ourselves if the same penalty is dot disproportionate in the case of some information which can be the object of the confidentiality clause, object constituted in a general manner by the employer, as we have shown. We go further with the criticism and we compare the two hypotheses of paragraphs 1 and 2 of the same article [6]. We notice that the sanctioned subject, taken into account by the second paragraph, is the person who acknowledges the work secrets and divulges them. The text makes no distinction about the modality in which the person in question gets to that situation, although in the case of the first paragraph hypothesis it is specified that the knowledge in question and the divulgation which comes after it manifest within work attributions. As a minimal preparation it is necessary so that a non-competent person could see that he/she is confronted with some work secrecy, our opinion is that, in some circumstances, one may get to abuse. Our example from Penal Code emphasizes best how and in which direction the information juridical protection has evolved. As whenever we deal with an adaptable system, it is justifiable to ask ourselves towards which direction it heads, and if it is somehow artificially created, which distances itself more and more from its natural purpose.

4. About Information and its Circulation

The protected object of both means previously shown is an extremely general one – the information. Neither because of labour laws nor because of rules that establish the work secrecy, did the legislator interfere excessively but he allowed the persons interested in the information protection to freely decide which information deserve this sort of label, and the manner of correlative accountability, be it financial, be it offered by the same legislator through other special laws. We think that through confidentiality, that information, which seems to be less important for the employer's activity than that classified as work secrecy, must be protected. This stratified information does not have to determine the employer to declare confidential all the information which circulates towards, among, or from his/her employees, because, sooner or later, an ineffective slowness in the legal entity's activity would be reached, situation which will finally lead to its lack of competitiveness on the relevant market. We believe that the best information

systematization would be in three categories: (i) free information, which each employee is allowed to access; (ii) confidential information, which only some minority groups from the employer's side are allowed to access, and (iii) work secrecy information, which the employer's existence depends on (commercial secrets which guarantee him/her a dominant position in a specific activity domain, a device a procedure, an intervention, etc.)

5. Private Information versus Public Information

Both confidential information and work secrecy information are meant, by those who create and accumulate them, to remain in their own patrimony. The most severe damage which this patrimony may suffer is that the information, which needs to be protected, to get to the public domain by divulgation, in other words, to emigrate in everybody's or nobody's patrimony, from which anybody may extract, change its direction, or utilize it for an unforeseen and even harmful way for the former owners. Such a difficult situation for some persons does not restrict the organization of a public domain of accessible information. On the contrary, from the very beginning of the national law of legal conditions applicable to various types of information, the legislators understood that they must stop the much more dangerous reverse transfer from the public domain to the private patrimony, thorough the information secrecy, which was to be known to everyone or which can evade criminal penalties [7]. So, to avoid such an abusive process, they stopped the information classification as work secrecy od the information born or cot into the public domain or which must get invariably to be known by the repressive authorities of the state. We may ask if this abstention obligation does not virally exist in the case of confidential information either. Our response is certainly positive, being known the fact that, because of the conventions, the parts cannot break or avoid the law appliance, the penalty being the absolute nullity of the documents and given conventions. So, no matter if because of the forming a confidentiality report or because of the secrecy they tend to hide the information in front of the public or the state specialised authorities, then the information protection cannot be realised, this can circulate towards others, too.

6. The Time Duration of the Information Protection

In contrast to the non-competition clause, another special clause of the labour individual contract, which, because of the legislator's will, can extend its effects even after the cessation which contains it, the confidentiality clause seems to stop its effects at the same time the contract stops, too. This appearance is emphasized because the labour law does not provide a term of the confidentiality clause survival after the labour individual contract stops, as the case of non-competition clause is. We believe that such an omission of the legislator does not prevent the parts of the labour individual contract to extend the validation of the confidentiality clause in time, and its penalty effects, too, after the moment of the extinction of the other clauses in the labour individual contract. Such a post-contractual extinction of the confidentiality obligation, the being product of the suitable clause, can be realised by various means, either direct (the drawing up of the c confidentiality clause from the beginning of the labour relations in a way which should include a validity term of confidentiality obligation, abusively against that of the labour individual contract), or indirect (by sending some specific regulations or intern conventions of the legal entity and, why not, of some specific law). The previously mentioned omission of the legislator did not perpetuate in the case of the work secrecy, the two laws being the product of two editors' groups with different resources regarding the law technique. The duration of the obligation to protect the work secrecy does not overlay the one of the involved

persons' relations, the relation itself not being relevant to the information protection, namely until the declassification and the exposure of the information. This means that the obligation to keep the information secrets exceeds in duration the work relation it was born for [8].

7. Conclusion

Boni pastoris est tondere pecus non deglubere (a good shepherd mows his flock of sheep, he does not flay it) [9] – declared the Roman emperor Tiberius with the occasion of a fiscal matter, willing to emphasize that everything that is excessive is harmful, too. Continuing the emperor's wise thoughts, we say that if the law and the contract gives us the necessary means to protect our information, it is our responsibility, because we got in a position of power, to choose discerningly and responsibly from the various materials and techniques, when we build the logical-legal structure, which takes us to bureaucracy, abuse, or success.

References

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[5] Law no. 286/2009 on Penal Code (amended), article 304
[6] Law no. 286/2009 on Penal Code (amended), article 304
[7] Law no. 182/2002, article 33
[8] Law no. 182/2002, article 36, para. 2
[9] https://en.wikipedia.org/wiki/List_of_Latin_phrases_(B).