THE CONFIDENTIALITY OBLIGATION IN THE NEW ROMANIAN CIVIL CODE*

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Abstract

The current enacted legislation offers a more detailed look into the negotiation phase and the formation of the contract. To this point, the current Civil code has recognized for the first time one of the specific obligations that result from the good faith principle, namely that of the confidentiality of the information exchanged by the parties during negotiations. While confidentiality is not an institution lacking in regard to its occurrence in secondary legislation, the presence of article 1184 Civil code acts as an encompassing text that should apply as a rule in all fields of law where a contract is negotiated

The scope of this paper is to set forth how this new legislation can be put into practice, how it relates to other fields of law and how it was applied through case law. In order to better understand what was the reasoning behind the chosen final form we will present the European influence on the Romanian Civil code in contractual matters.

Keywords: confidentiality, contract law, good faith, precontractual phase

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1. Introduction and governing provisions

The regulation of the confidentiality obligation is a new element for the Romanian Civil code. That is not however the case for the existing specialized legislation. Before the adoption of Law 287/2009 regarding the New Civil Code, the doctrine held that Law 11/1991 against unfair competition was the proper law to regulate the issue of confidentiality. In that context confidentiality was an integral part of the issue of protecting trade secrets. Another reason had to do with the level of detail in which it was addressed. Confidentiality was introduced as an express obligation in thousands of specialized normative acts[1]. However, in that context, the confidentiality obligation did not derive from a contractual relationship, but from the sensitive nature of the information that an employee had access to, or was handling in the course of his/her work duties.

Currently, the content and conditions necessary to fulfill the confidentiality obligation during pre-contractual negotiations have been established in Art. 1184 of the Civil Code. Thus, "when confidential information is given by one party within the course of negotiations, the other party is bound not to disclose it, nor use it for themselves, irrespective of whether the negotiations led to a contract being concluded or not. Breach of this duty triggers the liability of the party at fault."

Based on this definition, we can draw the conclusion that the confidentiality obligation is not a public order interest, but a private one[2], regulated via an open ended type norm. In this context, the parties are free to conclude confidentiality agreements, which may extend the scope of information being protected. In this case, the parties can also choose to extend liability. In contrast with the obligation of negotiating in good faith, the parties can choose to exclude this obligation. Thus, in the absence of a confidentiality agreement with an associated penalty for breach in this respect, the party that did not comply with the legal provisions shall cover given damages on the basis of tort.

In our view, the confidentiality of negotiations is actuality a corollary of the principle of good-faith, as the entire pre-contractual phase is governed by the behaviors the latter's demands (Romanian “exigenţe”). However, in certain rare cases, the application of the confidentiality obligation can be to the disadvantage of

[1] For a comprehensive list of examples in regard to Romanian legislation see R. Dinca, *Protecţia secretului comercial în dreptul privat*, Ed. Universul Juridic, Bucureşti, 2009, pp.340-356.

[2] Raluca Dimitriu, “Conduita părţilor pe parcursul negocierii precontractuale”, in *Noul Cod civil. Studii si comentarii. Volumul III*, Partea I, Cartea a V-a, Despre obligaţii (art. 1164-1649), Ed. Universul Juridic, Bucureşti, 2014, p.142.

one of the parties, in the sense that behaving in good faith could demand giving up confidentiality altogether. One example in this sense is the case of the consumer credit,[3] where the legislator chose to eliminate the confidential nature of the contractual relationship's content. In this case, confidentiality would be acting as a limitation of the consumer's means of defense, both in terms of the available proof as well as to form the basis of a finding of unfair terms. In conclusion, confidentiality should not be seen as an inflexible obligation.

We also need to note that a breach of confidentiality would not necessarily be sufficient to decisively prevent the conclusion of a contract, despite the fact that the party which incurred the damage would suffer a loss of trust. From a practical standpoint, if the economic interest of the party overwrites the damage caused by the confidentiality breach, the party may choose to finish the negotiations and conclude the contract. In addition to the recovery of the damages, the injured party can insist on adding a penalty clause to a confidentiality agreement concluded after the first breach, to prevent this situation from reoccurring.

In the drafting of the Civil Code the Romanian legislator was used the Draft Common Frame of Reference as a source for inspiration in regard to many institutions. Thus, the former chose to import the text of Art. II-3:302 paragraph (1)[4] in an near identical format. While the Frame of Reference is the original source of the topic of confidentiality for the duration of negotiations, it contains three other paragraphs that did not make it in the Civil Code. However, we feel that they are important to analyze at this point because they will provide us with important background information regarding this institution. A first element that is not regulated in the Civil Code comes from the definition of the term

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[3] According to art 40 (4) Emergency Government Ordinance 50/2010 regarding credit contracts with consumers "it is forbidden to insert clauses in contract that: a) oblige the consumer to keep confidential the terms and conditions of the contract;"

[4] Art. II. – 3:302: Breach of confidentiality

(1) If confidential information is given by one party in the course of negotiations, the other party is under a duty not to disclose that information or use it for that party's own purposes whether or not a contract is subsequently concluded.

(2) In this Article, "confidential information" means information which the party receiving the information knows or could reasonably be expected to know is confidential to the other party.

(3) A party who reasonably anticipates a breach of the duty may obtain a court order prohibiting it.

(4) A party who is in breach of the duty is liable for any loss caused to the other party by the breach and may be ordered to pay over to the other party any benefit obtained by the breach.

„confidential" itself. Absent express regulations in the Code, the recent doctrine has focused less on defining the concept of confidentiality, and more on the way it functions as an obligation not to do something.[5] Thus, the *Draft Common Frame of Reference* develops the concept in the second paragraph as follows „in this Article, <<confidential information>> means information which the party receiving the information knows or could reasonably be expected to know is confidential to the other party."

We thus find two additional elements that are not part of the Civil Code Art. 1184 –confidentiality can be the result of either: (a) the nature of the information shared (e.g. legal confidentiality obligations that protect a public interest matter); or (b) due to the context in which the information was procured (e.g. client-lawyer relationship, whereby the client needs to share confidential information which must not reach the other party(ies) in the case to ensure s/he receives the best defense). Although the nature and context in which the information was shared are not expressly provided for in the Civil Code, these obligations can arise on the grounds of the duty of good-faith during negotiations. In other words, behaving in good-faith prevents the parties' disclosure or using the information for their own benefit at the cost of the other party, as would be the case if the other party to the negotiations were to cause damages to the owner of the information, or would prevent the latter from benefiting from that information. The Draft Common Frame of Reference provides an accessible solution for this case, expressly establishing the legal foundation for such an action in Art. II-3:302(4) "A party who is in breach of the duty is liable for any loss caused to the other party by the breach and may be ordered to pay over to the other party any benefit obtained by the breach."

The Civil Code also addresses in Art. 1184 the issue of sanctions for breach of confidentiality. However, this is limited to stating "breach of this duty triggers the liability of the party at fault." Although the Romanian legislator has not imported the European norm mentioned above, we consider that the same effect – of paying back the benefits unjustly earned from the breach of confidentiality, can be obtained based on the liability carried by the party at fault of having broken the information confidentiality – i.e. the debtor of the confidentiality obligation. An evaluation of the conditions introduced by Civil Code Art. 1345 on unjust

[5] S. Popa, "Principiul bunei-credinţe şi al confidenţialităţii în materie contractuală", în *Noile coduri în evoluţia dreptului românesc*, Ed. Universul Juridic, Bucureşti, 2011, p. 63; I. Turcu, *Noul Cod civil*, Legea 287/2009, cartea a V-a. Despre obligaţii (art 1164-11649) comentarii şi explicaţii. ed. C. H. Beck, Bucuresti 2011. pp.156-158.

enrichment leads us to conclude that the only difficulty would relate to the economical damage suffered by the owner of the disclosed information. An interpretation that would derive from applying this law would not see the loss from the breach of confidentiality as a decrease of the party's patrimony but as a missing payment or service from the debtor of the confidentiality obligation in exchange for the valuable information obtained.[6] Thus, any profit made as a result of disclosing the information, or by using it for own purposes later leading to economic benefits, as a result of breaching the confidentiality obligation maybe the subject of a claim in court in conditions similar to those laid down in the Draft Common Frame of Reference.

The last additional element present in the Draft Common Frame of Reference, but not in the Civil Code, is Art. II-3:302(3) which gives the possibility to "a party who reasonably anticipates a breach of the duty [information non-disclosure] may obtain a court order prohibiting it." We can discern, at least in part, what would be the rationale behind the absence of this provision in the Civil Code.[7] From a procedural standpoint, this action is specific to common law systems, known as "injunction." This does not have a direct correspondence in the national law because it has features specific from a number of different institutions. The closest counterpart in this sense would be a preliminary injunction (Romanian "ordonanta presedintiala"). We understand why the owner of the information would feel the need to use such an instrument as the negotiations and the exchange of information advances and the other party's behavior suggests a breach is imminent and the damage would be real and provable. However, in Romanian law, we would have, at least from a technical standpoint, difficulties in implementing this instrument – i.e. requesting a preliminary injunction with the sole purpose to

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[6] The same solution is proposed by the comment of the article, as can be seen in "Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)", written by the Acquis Group, coordinated by Christian von Bar et al.: "C. Rights and remedies In relation to breach of confidentiality prevention is often more important than the recovery of damages. This is reflected in paragraph (3). Paragraph (4) gives a right to damages for any loss caused by a breach. The injured party may also be entitled to recover the benefit which the person in breach has received by disclosing the information or by using it even if that party has not suffered any loss. Although this remedy is not provided by the laws of all the Member States, it seems appropriate by analogy to remedies available for infringement of other intellectual property rights."

[7] Antoni Vaquer, "Farewell to Windscheid? Legal Concepts Present and Absent from the Draft Common Frame of Reference (DCFR)", *European Review of Private Law*, vol. 17, issue 4, 2009, p.500.

preserve the confidentiality of the information, for reasons such as litigation taxes (Romanian “taxe de timbru”) or even qualifying the nature of the claim. Thus, because of practical reasons, we consider the option chosen by the Romanian legislator to protect the confidentiality of the information only after the breach, but not before, as one acceptable given the circumstance.

2. Scope and conditions

Among the different stages of the contracting phase, we recall the stage of reviewing available offers before entering into negotiations as the first moment when the person starts gathering information about the other party with whom it wants to conclude a contract. With the beginning of negotiations, the parties will attempt to reach a common ground between their personal needs and the other party's interest. Analyzed in relation to the principle of good-faith in negotiations, the parties must cooperate and mutually inform each other, whereas this is not possible without a minimum exchange of confidential information.[8] We want to highlight at this stage that not all the information shared during negotiations is confidential. Civil Code Art. 1184 uses the wording “when *a* confidential information is given […] within the course of negotiations,” which leads us to deduce that not all, but just some, information shared during this period is confidential. Using a systematic interpretation of the way in which the legal text was created in the section regarding the formation of the contract, the parties do not have a general obligation to treat the information obtained during the negotiations as being confidential. For a party to be liable under Art. 1184, it is necessary for the information by any means to be deemed confidential.

Civil Code Art. 1184 currently represents in main enactment confidentiality and establishes necessary conditions to protect information offered during the stage of contract negotiations. They are as follows:

A. The confidential nature of the information in relation to the parties wishes. The first requirement focuses on the need for the existence of confidential information. We shall first analyze the main object of this requirement – the concept of information, followed by its distinguishing feature of confidentiality.

[8] R. Dimitriu, *op.cit.*, p.141. According to the author, “to protect this information means actually encouraging parties to negotiate and conclude contracts, because otherwise they would display o excessive remorse in doing so”.

According to a doctrinal opinion,[9] information carries an intangible, intelligible and material value which is susceptible of being transmitted. This opinion is reflected through the fact that the information itself has an intrinsic value for his/her owner, while confidentiality raises its value even more. This is the case for example for trade secrets, which are classified as a "type of confidential information, and compared to other types of information, this is distinguished by the fact that its commercial value results exactly from the confidential nature of the information itself."[10]

Trade secrets mark an example of a case where the protected information takes on the form of an object that benefits from legal protection based on the law because of the importance of its contents. Information in this case can take the form of a technology, work method, sales statistical data, know-how, etc. Thus, removing the confidentiality quality away from this information would not necessarily take away all its value, but only decrease the party's competitive advantage. As is the case for example with an expired patent, the owner can still continue to use the information, but in these circumstances it would bring exponentially less profit.

Compared to this, we consider that the Civil Code Art. 1184 has a larger area of applicability, because it also protects information that does not have standalone economic value or which normally is unlikely to be financially quantifiable. For example, let us suppose that an important foreign investment fund is evaluating the possibility of entering the local financial market, especially in an area that is less regulated, to fast-track its entry. To do this, the fund's managers hire consultancy companies, specializing in economic, financial and legal assistance, under a confidentiality clause to obtain information to help make its decision whether to enter or not the Romanian market. In this case, the absence or presence of the confidentiality clause does not determine a loss or a profit vis-à-vis the consultancy firms because the latter are not engaged in the same type of economic activities with the investment fund and have no exponential stake depending upon the clients actions. However, the disclosure of the fact that a major player is interested in entering the Romanian financial market would have a ripple effect in this part of the market, both horizontally – competitors would have a lead time to prepare for the new player in the market, as well as vertically – as potential

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[9] R. Dincă, *Protecţia secretului comercial în dreptul privat*, Ed. Universul Juridic, Bucharest, 2009, p. 40.
[10] R. Dincă, *op.cit.*, p. 327.

clients, already aware of the fund's reputation, would also have the time to prepare and direct their activities to contract with the new player as soon as it hits the market. Thus, the confidentiality obligation enshrined in the Civil Code covers any type of information and comes to complement niche regulations that were already present in the legislation.

B. Exchanging said information during negotiations. In the previous section we have discovered that a piece of information can be intrinsically confidential, or due to the context in which it was obtained. In the case of negotiations between professionals, it is easier to assess whether a particular piece of information that has been communicated is confidential. Should a party need to prove the confidential character of the correspondence exchanged with another professional, the former can argue that the fact that the files and documents shared were sent via email or digitally are in themselves official channels of communication between the parties, and this implicitly means the information needs to be protected.

In addition, we would like to point out the provisions regarding confidentiality for special contracts introduced by the Draft Common Frame of Reference.[11] Thus, according to Art. IV.E.-2:203(3), "any information which a party already possessed or which has been disclosed to the general public, and any information which must necessarily be disclosed to customers as a result of the operation of the business is not regarded as confidential information for this purpose." Thus, in the case in which the information communicated during negotiations was already known by the other party or needed to be communicated regardless – this type of information is exempt from the Civil Code Art. 1184. Thus, the requirement that the information has to be communicated during negotiations does not override the fact that the information may not be confidential. More often than not, negotiations are conducted in a fast paced rhythm, using a written format only to record essential elements in the

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[11] Art. IV. E. – 2:203: (1) A party who receives confidential information from the other must keep such information confidential and must not disclose the information to third parties either during or after the period of the contractual relationship.
(2) A party who receives confidential information from the other must not use such information for purposes other than the objectives of the contract.
(3) Any information which a party already possessed or which has been disclosed to the general public, and any information which must necessarily be disclosed to customers as a result of the operation of the business is not regarded as confidential information for this purpose.

negotiation[12]. This practice can raise evidentiary difficulties regarding the method by which the information was communicated. Since the provisions in this area are not detailed, we side with the opinion[13] that from a legal stand-point the communication of confidential information, with respect to its confidentiality not the means of communication, is a matter of fact.

3. Information disclosure in the view of secondary legislation and case law

There is a wide range of reasons as to why disclosure is prohibited – starting from public image issues,[14] personal preference, to economic reasons.[15] Thus, we can speculate that obligation to uphold information is limited only to the parties of the contract, and not to third parties even if they have an interest. This issue was partially addressed by the High Court of Cassation and Justice decision 2998/2009 (commercial section)[16] where the scope of the confidentiality obligation was analyzed. In this case, a brokerage firm refused to disclose information regarding a contract it concluded with a physical person, which had passed away in the meantime. The company argued that there the confidentiality clause in the contract prevented it from disclosing the sought after information. The court ruled on that occasion that the duty of confidentiality only operated during the life of the contracting party. The final ruling set that the defunct party's heirs were entitled to access the relevant information because, for the duration of the contract, the firm's activities had direct effects on the assets of the deceased, and by proxy to their inherited assets.

We would like to point out at this juncture that we are facing a substantive contradiction. If the confidentiality had ceased with the passing of the contracting party, then the parties to the case would not have had to prove their quality as heirs, the case resolution thus having the same effect even for persons who had not been recognized as having the quality of heir for whatever reasons. We propose that the most appropriate approach to apply the law in this case would have been to compel

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[12] R. Dincă, *op.cit.*, p. 496.

[13] F.A. Baias, *Noul Cod civil. Comentariu pe articole*, Ed. I Revizuită, Ed. C.H. Beck, Bucureşti, 2012, p. 959.

[14] Disclosing information that an economic agent mught go outside it's area of expertise in one under public scrutny, as is the case for environmental related activities in Romania, might lead to a direct backlash for considering entering that line of business.

[15]. R. Dincă, op.cit, p. 327.

[16] Ruling 2998/2009 of the Romanian High Court of Cassation and Justice.

the brokerage firm to disclose the information to the heirs because they had thus become parties to the contract. Of course, this would not have been possible had the primary contracting party not passed away, which had also led to the termination of the contract. Here, the obligation of confidentiality falls on the brokerage firm which is not allowed to make public the situation regarding the contracting party's investment situation. Taking into consideration that such information is communicated to investors on a regular basis, it is possible that the deceased had copies of the information sought by his heirs. Thus, we could argue that the deceased wanted to keep the information confidential for personal or family-related reasons. The damage from disclosing the confidential information in this case would not be material, but personal, or at the most to the deceased party's imagine inside his family. To conclude, the take-away argument from this case is confidential information may not be disclosed dependant on its scope and it should be strictly forbidden from disclosure in any case. An additional argument in this sense is presented by the interpretation rule "ubi lex non distinguit, nec nos distinguere debemus" of art 1184 Romanian Civil Code.

Regarding the use of confidential information for one's own benefit, we state that the only logical interpretation in this context is that the information must be used only within the parameters defined by the contract.

With respect to labor law relations, confidentiality is not regulated by a norm with general applicability. Confidentiality is recognized as an option available to the parties by the Labor Code Art. 17(7), which states that „the information provided to the employee, prior to the conclusion of an individual employment contract, can lead to a confidentiality agreement between the parties." Thus, the pre-contractual phase can be governed by the provisions of the Civil Code Art. 1184, as in fact the agreement concluded prior to the employment contract has the features of a civil-law contract.[17] Once the parties have moved into the execution phase of the contract, the contents of the information that the employees has access to can be protected by a "specific" clause.[18] One distinct

[17] R. Dimitriu, "Clauza de neconcurenţă şi clauza de confidenţialitate în reglementarea noului Cod al muncii", *Revista Româna de Dreptul Muncii* 2/2003, p.26.

[18] The Labour Code states at art. 20 the existence of special clauses of the individual employment contractand recognises confidentiality as being a specific clause

Art. 20. [(1) Besides the essential clauses provided for in Article 17, the parties may also negotiate and include other specific clauses in the individual employment contract. (2) The following shall be considered specific clauses, while the enumeration is not meant to be limitative: a) clause on vocational training; b) non-compete clause; c) mobility clause; d) confidentiality clause.

element compared with general civil law results from the Labor Code Art. 26 which provides for the possibility that the confidentiality obligation can result for the business' internal regulations/policies, or the collective labor contract, where applicable. Thus, in such cases, the clause is external to the individual employment contract, but implicitly accepted by the employee.

In this context, liability does not differ from general civil law because it gives the employer the right to recover damages ensuing from disclosure of the confidential information. However, we need to mention that by comparison with Civil Code Art. 1184 this liability will always be of a contractual nature, because from a procedural standpoint it is viewed as an litigation on the ground of individual employment contract, the business's internal policies and regulations, or a preliminary pre-contractual agreement.

4. Conclusions

From a big picture perspective, the express recognition of the duty of confidentiality has the positive effect off aligning Romanian legislation with that of other EU countries. While one can argue that confidentiality was well protected even in the previous legislation, the current article aims to aid the party that has suffered damages due to unlawful disclosure of information presented during negotiations in the sense that is has express grounds to file for damages through a claim in court. The duty of confidentiality, by its means as an extension of negotiating in good faith, also marks another example as to how the general principle of good faith is ever expanding and gaining recognition as a practical principle and not just as an abstract rule of conduct. Similar new applications of good faith can be found that were absent in the old legislation, such as duty to inform, but confidentiality encompasses in a more concrete manner how the parties are bound by their contractual loyalty and reciprocity and to that extent, the current enactment of the law serves multiple needs.

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