

Protection of business secrets in e-invoicing (2)

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Conclusion of the article from the previous week.

Protection of information

The mere fact that the owner of a trade secret considers certain information to be a trade secret or recognises it internally as such is not sufficient. Section 6 of the Trade Secrets Protection Law requires the trade secret owner, when disclosing such information to a natural or legal person, to indicate which information is to be considered a trade secret and, at the same time, to inform about the need to ensure the protection of such information. Under the requirements of Section 2 of the Trade Secrets Protection Law, only economic information, technological knowledge or other types of information that meet all of the following characteristics are recognised as trade secrets:

- It is secret because it is not generally known or accessible to persons who normally use that type of information;
- It has actual or potential commercial value because it is secret;
- The trade secret owner has taken appropriate and reasonable steps to maintain the secrecy of the trade secret concerning it.

This requires, inter alia, that the trade secret owner take appropriate and reasonable measures to protect the confidentiality of the trade secret. An indication by the trade secret owner as to which information contained in an electronic invoice should be recognised as a trade secret and a request for appropriate protection of this information are recognised as such. If this is not done, the trade secret owner has not acted in accordance with the statutory provisions and the information in question is not subject to statutory trade secret protection.

When using PEPPOL services, in the interest of the owner of the trade secret, it should be pointed out when the contract is concluded which information (items) contained in the electronic invoice are to be classified as trade secrets and protected. If such information is not included in the contract or if certain information only acquires the status of a trade secret at a later date, this does not prevent the exercise of these rights and at the same time the obligation at a later date.

If the parties have agreed to use direct software integration interfaces or an online platform for e-invoicing, such an agreement is likely to be oral. However, it does not release the trade secret owner from the obligation to disclose what information constitutes a trade secret and to request its protection. It should be noted that it is not sufficient to make such a declaration orally. In the event of a legal dispute, it will not be possible to prove the existence of such a declaration. Furthermore, case law has repeatedly recognised that the existence of a trade secret must be communicated in writing and that this communication must be unambiguous, i.e. the information constituting a trade secret must be clearly stated.

This means that the trade secret owner only has a legal basis to take action against the publisher of the

information in the event of a breach and to demand the enforcement of the liability provided for in the legislation if he has taken measures to protect the information.

To summarise, it follows from the above that the information contained in an electronic invoice may contain trade secrets, but that it is primarily the issuer of the electronic invoice itself that must take active measures to protect this information by agreeing in writing which information contained in the electronic invoice contains trade secrets and that these must be protected. Otherwise, the legal protection of the information contained in an electronic invoice as trade secrets does not apply.