

Question Q215

National Group: Hungary

Title: **Protection of trade secrets through IPR and unfair competition law**

Contributors: Dr. Gusztáv BACHER, Dr. Vilmos BACHER, Dr. Gábor FALUDI, Dr. Marcell KERESZTY, Dr. Áron LÁSZLÓ and Dr. Eszter SZAKÁCS

Representative within Working Committee: Dr. Gusztáv BACHER, Head of the Working Group

Date: 30 April 2010

Questions

General

Groups are asked to give a description of legal developments and the current situation in their jurisdiction with regard to trade secret protection, answering the following questions:

1. *Legal developments on trade secrets*

Private law protection of trade secrets in Hungarian Law is granted by competition law and civil law. Both interlinking legal protections are in compliance with the TRIPS Agreement.

The TRIPS Agreement was promulgated in Hungary by Act No. IX of 1998. Although TRIPS is an international agreement establishes obligations for contracting states to implement in their legislations, individuals in legal disputes cannot directly base any claim on its trade secret provisions. TRIPS may have a role when it comes to the interpretation of national legal provisions concerning trade secret protection.

Even before TRIPS was promulgated in Hungary, the official explanatory note to the Bill of the Competition Act (Act No. LVII of 1996 on the Prohibition of Unfair Market Practices and of Restrictions of Competition) explicitly mentioned that due to the provisions of the new Act, the compliance of the Hungarian rules on trade secret protection with TRIPS (especially Article 39) shall become even more apparent. For this purpose the Act made it unambiguous: in order to establish the existence of a trade secret it is necessary that the fact, information, solution or data be kept secret and the owner of such information should make all reasonable efforts to preserve secrecy.

2. *Definition of trade secrets*

The definition of trade secret is set forth in the Civil Code (Act No. IV of 1959), in the chapter on the protection of personal rights. The Competition Act and the Criminal Code apply the same definition, with reference to the definition in the Civil Code.

According to Article 81(2) of the Civil Code, trade secret means all facts, information, solution or data pertaining to economic activities the publication of which, or the acquisition or use of which by unauthorized persons, is likely to violate or imperil the financial, economic or market interests of the owner of such secret, provided the right holder has taken all the necessary steps to keep such information confidential.

The Hungarian State and local governments within Hungary are exempted due to the requirement that their financial and economic relationships must remain in the public domain for the purpose of social transparency (the State as an actor involved in commercial legal relationships may not rely on the protection of trade secrets). Therefore, Article 81(2) of the Civil Code excludes any fact, information, solution or data that are related to the economic operation of the State or a local government from being considered as trade secret, even if they would qualify as trade secret if controlled by other legal entities.

In addition, the Civil Code includes provisions on some exceptions. Articles 81(3) and 81(4) provide that data that qualifies as public may not be deemed as trade secrets unless it incorporates know-how (intellectual creation). Data that relates to financial connections with the State, a local government or EU budget/funds shall be public. Therefore no one can rely on the protection of trade secret if the subject-matter of the protection qualifies at the same time as public data. Nonetheless, if the data incorporates know-how (please see below), the exception does not apply. In other words, the protection of know-how overrules the mandatory access to public information.

The definition of trade secret will change slightly in the new Civil Code, which was adopted as Act No. CXX of 2009 (the "New Civil Code"). The new definition covers not only facts, information, solution or data, but also the compilation prepared thereof. The rules on trade secret can be found in Book 2 of the New Civil Code. Currently, it cannot be predicted when the Book 2 of the New Civil Code will enter into force.

The information (fact, information, solution or data) that constitutes the content of a trade secret is broadly defined by the above provision of the Civil Code. The definition of trade secret involves the following two conceptual elements:

- the protection of the owner's financial, economic or market interests; and
- the proviso that the right holder shall take all the necessary steps to keep such information confidential.

The fact, information, solution or data that qualify as trade secret have commercial value, because they are secret. *Secrecy* means that the information is not part of the public domain, the information has not been disclosed to the public and it is not easily accessible. The information may therefore be known, subject to a non-disclosure obligation, to a group of limited persons (e.g. managers and employees who directly use the information), but it shall not be known generally and shall not be easily obtainable to professionals and competitors in a particular economic field. Only if this requirement is met, there is a "lawfully controlled information" in the meaning of TRIPS. The definition mentioned before does not require an absolute secrecy, since it is possible that the same information has been produced and is kept in secret by somebody else at the same time.

For instance, in the Hungarian case law, data of a clientele (BDT2002.711) and a recipe for an energy-drink (BDT2006.1492) qualified as trade secrets.

A further element of the concept of trade secret is that the right holder has taken all the *necessary steps to keep such information confidential*. The right holder's intention and efforts to protect the secret information can be proven by having issued internal rules of data safety and protection, non-disclosure provisions of an agreement, indication of confidentiality on data carriers, physical separation or seclusion of them, operation of a communication system that minimizes access to and "leaking" of trade secrets, as well as control and restriction of such system (e.g. restricted to internal staff, exclusion of visitors, business partners) and backups in order to prevent loss of data.

Under the Civil Code, know-how qualifies as a subject-matter of protection of intellectual property and at the same time as a type of trade secret. The latter element of the term follows from the termination of the legal protection: if the know-how becomes public domain the legal protection ceases to exist.

As know-how has a separate legal definition, we find it necessary to present them separately. The Civil Code declares under the title "*Rights Related to Intellectual Creations*" that persons shall also be entitled to protection with respect to economic, technical and organizational knowledge and experience that has financial value (Article 86(4)). The protection exists in the case of an already started or planned utilization until becoming part of the public domain. Practical knowledge and experience are not evidently creations but other results of intellectual activities; the Civil Code categorises them as intellectual creations for this reason. The court practice defines know-how on the basis of Article 86 of the Civil Code as follows: "According to the theory and practice based on Article 86(4) of the Civil Code, know-how is essentially economic, technical, organizational knowledge and experience, which can be used in practice and is accessible to a limited extent; and which is protected until becoming part of the public domain; know-how is assignable, i.e. transferable. The value of know-how arises from the limited access thereto, the knowledge represents an advantage as compared to other market participants. The knowledge may be secret, but it is also possible that it is not, where the mere compilation of the knowledge according to special aspects requires such an amount of work that someone wishing to use it prefers to obtain the knowledge by means of a contract, than producing it in an own research" (BH 1992.257).

Contrary to the definition of trade secret, the current legal definition of know-how does not contain the element that the right holder shall make all reasonable efforts to preserve secrecy. Nevertheless, as the protection exists until becoming part of the public domain, it is in the right holder's interest to expend the necessary efforts to maintain secrecy.

The approach to the concept of know-how will change slightly in the New Civil Code, in that the new provisions on know-how are not placed among the provisions on intellectual property. Know-how, notwithstanding the fact that it is knowledge and thus an intellectual "product", is dealt with under the trade secret. Although the New Civil Code does not state expressly that know-how is a subtype of trade secret, it provides that an illicit use (exploitation) of know-how qualifies as infringement of trade secret.

Articles 2.86(3)–(5) of the New Civil Code provide for legal protection. Know-how is defined as "technical, economic or organizational knowledge or experience or an assembly thereof (the knowledge and the assembly of knowledge is called together: knowledge) if such knowledge is fixed in a way that is suitable for identification."

As a result, the New Civil Code maintains the distinction between the protection of factual trade secrets (information, data) and that of knowledge.

Know-how shall be protected so long as it is secret in the sense that it is not *per se* or in its assembly generally known among or readily accessible to persons carrying out activities in the field of the exploitation of the know-how, has commercial value, and the holder of the right in the know-how has made reasonable steps attributable generally under the circumstances to keep the know-how secret.

The subject-matter of the legal protection is that the holder of the know-how shall have the right to prohibit the acquisition, exploitation (use), communication to third persons or the disclosure of the know-how on the condition that such acts are committed in a manner contrary to fair commercial practices. There are exceptions from the legal protection. Protection may not be claimed against persons who:

- developed the knowledge or a similar knowledge that is substantially similar to the knowledge independently,
- acquired the knowledge or a similar knowledge that is substantially similar to the knowledge via examination or analysis of a lawfully acquired product or lawfully used service (reengineering/decompilation), or
- acquired the knowledge or a similar knowledge that is substantially similar to the knowledge from a third party bona fide for consideration.

A specific definition of know-how in the field of antitrust law is set forth in Commission Regulation (EC) No. 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements. For the purposes of this Regulation, "know-how" means a package of non-patented practical information, resulting from experience and testing, which is: (i) secret, that is to say, not generally known or easily accessible, (ii) substantial, that is to say, significant and useful for the production of the contract products, and (iii) identified, that is to say, described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality.

In Hungarian law, provisions with similar subject matter can be found as follows: Government Decree No. 86/1999 (VI.11.) on the exemption of certain groups of technology transfer agreements, as well as Government Decree No. 55/2002 (III.26.) on the exemption from the prohibition on restriction of competition of certain groups of vertical agreements (in the parts relating to intellectual property aspects). These Decrees refer to Article 86(4) of the Civil Code when defining know-how, and do not use the definition set forth in EC Regulation No. 772/2004.

3. *Control of trade secrets*

In general, as a result of the applicable Hungarian law, it can be established that the employer has control over the information created by an employee, even if personal knowledge and skills of the employee were involved. No specific assignment is required, and co-ownership of trade secrets does not exist in the Hungarian legal system. The rights pertaining to a trade secret shall belong to the employer by virtue of the labour/service contract.

The employee has a general obligation of confidentiality as part of its employment obligations. Employees shall not disclose any business secrets obtained in the course of their work or any information of importance pertaining to the employer or its activities. Furthermore, employees shall not convey to unauthorized persons any data learned in

connection with their activities that, if revealed, would result in detrimental consequences for the employer or other persons (Labour Code, Article 103(3)).

If the confidentiality rules are breached, the employer can sanction the employee according to the labour law. Competition rules may be applied when the holder of the confidential information takes action based on unfair competition against an undertaking that utilizes the information unfairly obtained with the assistance of the employee. It is unequivocally unlawful if the information is provided during the labour relationship. Situations where the employee utilizes its information when employed by another undertaking or starts business activities himself/herself, shall be examined by taking into account all circumstances of the case. It shall be emphasized that the utilization of the general knowledge of a professional at a new workplace can not be restricted by its nature, since the opposite opinion would infringe the principle of the freedom to be employed (BH 1995.231). This knowledge is "in the brain of the employee", whereas it is prohibited to copy data qualifying as business secret. The fact that the employees have transferred the intellectual knowledge obtained during their work into the company founded by them, may not be *per se* objected (BH 1997.407). If the employer wishes to restrict the utilization of information, it may conclude a so-called non-compete agreement with the employee, which may prohibit e.g. employment at a competitor, or the starting of an undertaking pursuing the same business activity as the former employer. The non-compete obligation can be imposed in exchange for appropriate consideration only and may not last for more than three years from the termination of the employment relationship (Labour Code, Article 3(6)).

Based on the nature of information, one must differentiate between fact and data on the one hand, and knowledge on the other. If the employee creates a service invention, or service work (protected by copyright) the inventor/author shall notify the employer of any service or employee invention immediately following its creation (Article 11 of the Patent Act (Act No. XXXIII of 1995 on the Protection of Inventions by Patents), and Article 30 of the Copyright Act (Act No. LXXVI of 1999)). In case of service inventions the employer can either decide whether to file a patent application, or keep the invention secret and exploit it as trade secret provided that the patentability of the invention on the date of receipt of the notification is acknowledged by the employer.

4. *Source of law for trade secret protection*

Under Hungarian law, the protection of trade secrets is governed by statutory laws. Court precedents play an important role in clarifying the actual application of statutory rules, pivotal judgments of the Supreme Court as well as the Courts of Appeal are regularly published and often cited by both practitioners and courts. The relevant provisions of the TRIPS Agreement are not directly applicable in Hungary, however, they are also cited in construing statutory law.

Under Hungarian law, trade secrets do not belong to the category of property rights. The fundamental definition of trade secret is stipulated in the Civil Code in the section laying down the rules of personal rights. Although the rules on know-how protection currently also fall under the title of intellectual property rights, the New Civil Code will regulate know-how as a type of trade secret among the rules of personal rights (see our response to question 2). This does not mean, however, that trade secrets, or even more so, know-how, do not have property aspects, e.g. know-how can be subject to sale and purchase, or contribution in kind.

The protection of trade secrets is regulated not only in the Civil Code. The Competition Act also provides protection within the framework of protection against unfair competition. In addition, the Criminal Code provides protection against trade secret violations.

5. *Available remedies*

Remedies under Civil Code

Pursuant to Article 81(1) of the Civil Code, any person who (...) has come into the possession of a (...) trade secret and publishes such secret without authorization or abuses it in any other manner shall be construed as violating personal rights.

Under Article 84 of the Civil Code, the following civil remedies are available, depending on the circumstances of the case. The injured party may demand that:

- a) the court declares the occurrence of the violation of law,
- b) the infringer cease the violation and be prohibited from further violation in the future;
- c) the infringer give satisfaction by way of a statement or in another suitable manner and, if necessary, that appropriate publicity be given to the satisfaction on the part or at the expense of the infringer;
- d) the injurious situation be terminated and the former status quo be restored by and at the expense of the infringer and, furthermore, the objects created due to the violation be destroyed or such objects be deprived of their injurious nature;
- e) compensation for damages in accordance with the tort law of the civil law.

If the amount of damages is not in proportion with the gravity of the violation, the court is entitled to impose a fine to be used for public purposes. However, we are not aware of any court practice applying this rule.

Furthermore, the Civil Code contains a specific extra relief for know-how in that the holder of the know-how may also demand a share of the financial gains from the person who has expropriated or used the know-how (Article 87(2) of the Civil Code).

Under the New Civil Code, the injured party will have the same remedies and may also claim to recover the material advantage achieved by the infringement. In addition, in case of negligent (culpable) infringement, damages can be claimed (a tort liability exists). The injured person can also claim exemplary damages ("sérelemdíj", similar to "Schmerzensgeld" in German law), i.e. "lump sum" damages to compensate the infringement of personal rights. As opposed to the claim for damages, with exemplary damages the injured party does not have to evidence the prejudice beyond the violation of law.

The New Civil Code will stipulate as a general rule that the injured person may request the infringer to hand over any financial gains achieved through the violation. Nevertheless, in connection with the protection of know-how, claims that can be enforced in case of know-how infringement are identical with those existing for infringement of other protected personal rights.

Remedies under Competition Act

Unfair competition law also provides remedy against the violation of trade secrets. According to Article 4 of the Competition Act:

(1) It is prohibited to gain access to or use business secrets in an unfair manner, and to disclose such secrets to others or to publish them without authorization.

(2) It shall also qualify as gaining access to business secrets in an unfair manner where access to such business secrets has been obtained without the consent of the entitled

person through a party in a confidential relationship or business relationship with such person at the time of or prior to gaining access to the secrets.

(3) For the purposes of this Act:

a) 'business secret' shall have the meaning defined in Article 81(2) of the Civil Code;

b) 'confidential relationship' shall, in particular, mean employment relationship, other work-related contractual relationship and membership;

c) 'business relationship' shall comprise the provision of information, negotiations and making proposals prior to making a deal, whether or not a contract is subsequently concluded.

The following remedies are available in the case of the violation of trade secrets under Article 86 of the Competition Act. The affected party may demand in his/her claim:

i) that the violation of the law be established;

ii) to enjoin the infringer from the infringement (cease and desist order);

iii) that the infringer give satisfaction by way of a statement or in another appropriate manner, and, if necessary, that sufficient publicity be given to the satisfaction on the part or at the expense of the infringer;

iv) the termination of the injurious situation, to have the former status quo reinstated, and the deprivation of the injurious nature of the goods manufactured or placed on the market illegally, or, if this is not possible, the destruction thereof, and the destruction of any special means used for the manufacture thereof;

v) compensation for damages in accordance with the rules of civil law;

vi) that the infringer disclose information on the parties participating in the manufacturing and marketing of the goods involved in the case as well as on the business relations established to distribute such goods;

vii) restitution of the economic gains achieved through the infringement;

viii) the seizure of the means and materials used solely or primarily for the infringement, as well as of the goods affected by the infringement, or having them handed over to specific persons, or recalled or withdrawn from commercial circulation, or the destruction of such goods;

ix) to have the decision disclosed at the expense of the infringer. Disclosure shall, in particular, mean publication in a national daily newspaper or being posted on the Internet.

The Competition Act specifically provides for situations where undisclosed information is accessed "through a party in a confidential relationship", where confidential relationship means, in particular, an employment relationship, other work-related contractual relationship, and membership. As for the remedies, these are not differentiated from those of other cases.

Preliminary injunction

According to Article 156(1) of the Hungarian Civil Procedure Code (Act No. III of 1952), a court may issue a preliminary injunction in order to (i) prevent imminent damage; (ii) maintain the status quo during a legal dispute; or (iii) protect the claimant's rights requiring special

protection. This stands as long as the burdens imposed by such a measure do not exceed the benefits that may be gained by it. The facts relating to the reasoning of the request for a preliminary injunction must be of a probable nature.

The Competition Act contains specific rules for court proceedings relating to violation of trade secret (the same special rules apply also in case of passing-off claims). The court shall rule on a preliminary injunction no later than 15 calendar days following the submission of a petition for such measures. In practice the court ruling takes about 4 to 6 weeks.

Further, the injured party may, in addition to civil law claims, request the court to order (under the conditions applicable to preliminary injunction) precautionary measures to be taken in accordance with the provisions laid down in the Act on Judicial Enforcement, if he/she is able to show that any later attempt to satisfy his/her demand for damages or the restitution of the enrichment achieved through the infringement is endangered; furthermore, he/she may request that the infringer be obliged to disclose and present his/her banking, financial and commercial data and documents for the purpose of ordering the precautionary measures mentioned above.

Protection under the Criminal Code

Article 300 of the Criminal Code sets forth the rules relating to violation of business secret.

(1) (...) the person who illegally acquires, uses, or publishes a trade secret for financial gain or advantage, causing pecuniary injury to others is guilty of a felony punishable by imprisonment for up to three years.

(2) No punishment shall apply on the grounds of violation of trade secret against any person:

a) who conveys information in fulfilling the duties prescribed in a separate Act governing the publication of public information and information to be made available in the public interest; or

b) who conveys information subject to the reporting obligation prescribed in the Act on the Prevention and Combating of Money Laundering and Terrorist Financing or who initiates such action, even if the report he filed in good faith has proved to be unfounded;

c) who conveys information subject to the reporting obligation prescribed by law in connection with insider trading, market manipulation and the fight against terrorism, or who initiates such action, even if the report he filed in good faith has proved to be unfounded.

Evaluation of the Q115 Copenhagen Resolution

We are of the view that although the wording and concepts used in the Copenhagen Resolution and in Hungarian law are different, the conducts under i) to iv) of Point 11.11 of the Q115 Copenhagen Resolution qualify as trade secret violation.

As regards the issue of trade secrets obtained in good faith, raised in the Copenhagen Resolution under v) of Point 11.11, the New Civil Code expressly declares that there is no violation of trade secret if the trade secret is received in good faith.

The concept of "grossly negligent" referred to in footnote 10 of Article 39(2) of TRIPS

The concept of "grossly negligent" third parties referred to in footnote 10 of Article 39(2) of TRIPS, is not expressly regulated in Hungarian law, neither is any published case law available in this respect. However, we are of the view that on the basis of the existing statutory provisions, the Hungarian courts would come to an interpretation that is parallel to footnote 10 of Article 39(2) of TRIPS.

Damages, calculation of damages

Damages may be awarded in cases falling within the regulation of both the Civil Code and the Competition Act. Moreover, in cases falling under the Competition Act, a transfer of the gains achieved through the violation of trade secrets may also be requested (recovery of profit). In case of know-how infringement, the know-how holder may also demand a share of the financial gains from persons who have expropriated or used his know-how under Article 87(2) of the Civil Code.

In the course of proceedings for claiming damages, the injured party must evidence: (i) the amount of his/her loss suffered as a consequence of the activity of the other party, and (ii) the causality link between the activity of the defendant and the suffered damages. The infringing party can be ordered to pay compensation for damages unless he/she can prove that his/her behaviour was not culpable.

Article 355(4) of the Civil Code sets forth that "by way of compensation the loss of value in the property of the injured person and the loss of profit sustained as a consequence of the damaging act, as well as the indemnification of expenses needed for the reduction or elimination of the financial and non-financial losses shall be given." Elements of the loss:

- (i) loss of value in the assets of the injured party (*damnum emergens*);
- (ii) loss of profit sustained as a consequence of the infringement (*lucrum cessans*), and
- (iii) indemnification for expenses which were necessary for the mitigation of the losses; and
- (iv) non-pecuniary loss.

In practice it might be difficult for the plaintiff to prove the exact amount of loss of profit, since they have to refer to potential / hypothetical revenues that would have been achieved had there been no violation of trade secret. Further, the plaintiff must prove its profit margin, which is sensitive business data. In order to avoid the disclosure of profit margin, the plaintiff might choose to enforce only claim for recovery of economic gains.

Non-pecuniary losses can be claimed only if the plaintiffs can prove a non-pecuniary detriment (prejudice) caused by the infringement (i.e. detriment to its reputation). Current Hungarian law does not have the concept of punitive damages. The damages award is meant to provide full repair, i.e. to compensate a party from the loss actually suffered, but not more (thus, the aggrieved party must not be overcompensated).

The New Civil Code will introduce exemplary damages ("*sérelemdíj*"), i.e. "lump sum" damages, to compensate the infringement of personal rights where the injured party does not have to evidence the prejudice beyond the violation of law.

Further, the court may order the defendant to pay estimated compensation for damages if the extent of damage (usually the lost profit element of the damage) cannot be precisely - even if only in part - calculated / evidenced. In the course of litigation and the fact finding procedure, difficulties may arise in evidencing the reduced turnover due to the violation of

trade secret (outstanding profits). Hungarian courts usually require a high degree of convincing evidence relating to loss of profits.

The estimated damages should suffice for providing the injured party with full financial compensation. A judgment on estimated damages constitutes *res judicata*, the decision cannot be changed even if it turns out in the future that the extent of actual damages did not actually reach the amount of the estimated damages.

In case the plaintiff claims both for damages and for the recovery of profit jointly, the amount of the recovered profit shall be deducted from the amount of damages. This means that these both claims cannot be cumulated.

6. *Protection of trade secrets before and during litigation*

The protection of trade secrets during litigation is ensured by the provisions of the Code of Civil Procedure which generally apply to all types of civil law litigations. First, the protection of trade secrets is ensured by an exception from general principle of publicity of oral court hearings: the judge may exclude the public from a part or from the entirety of the oral hearings if it is necessary for the protection of trade secrets (Article 5). Furthermore, if the public is banned from the oral hearing even the parties cannot make copies of the minutes of such hearing or of documents containing the concerned trade secret. Second, if during the litigation any document containing trade secret is submitted, the parties' right to inspect the court files is subject to a special declaration of non-disclosure and the judge shall establish in its decision a special procedure to review such documents (Article 119). However, if the holder of the trade secret did not consent to the disclosure of the trade secret no one may inspect the concerned document except for the judge and court clerk (Article 119). In Hungary there are no rules on discovery proceedings as in common law countries.

In cases of IP infringement, in line with the EC Enforcement Directive (Directive No. 2004/48/EC), as incorporated into the respective IP laws, the right-holder may, inter alia, demand that the infringer provide information on the identity of persons involved in the production and distribution of the infringing goods or the provision of infringing services and of their channels of distribution. No defence based on trade secret can be invoked by the infringer against such claim.

7. *Licensing trade secrets*

There are no specific legal provisions in Hungary for licensing trade secrets. If the trade secret constitutes know-how, the practice of patent licensing is generally followed, particularly because the transfer or licensing of know-how usually accompanies the transfer or licensing of patents in the same contract. (It must be noted that Article 28(5) of the Patent Act provides that the patentee is obliged to transfer economic, technical and organizational knowledge and experience (know-how) in connection with the utilization of the patent only if this has been expressly agreed.) From a theoretical point of view, the know-how licensing is a consent given by the know-how right holder to use private information and the licensee agrees to pay a consideration for the granting of this consent.

A critical issue in case of contractual relationship is that the know-how has to be manifested/identified in some materialized form (i.e. writing, digitally stored material etc.) According to a leading decision of the Supreme Court, if know-how is provided as an in-kind contribution upon the establishment of a company, the know-how must be provided in a materially manifested form, so that the company can possess the document or data carrier containing the know-how and the existence and handing over of the know-how can be proven.

Anti-trust considerations are addressed by Government Decree No. 86/1999 (IV.11.), which grants block exemption to certain know-how licensing agreements in the form of technology transfer agreements from the prohibition of agreements restricting economic competition.

8. *Effectiveness of non-disclosure and non-use agreements*

Non-disclosure and non-use agreements are effective means for protecting and enforcing trade secrets in Hungary. On the one hand, such agreements declare and evidence the existence of trade secrets, and on the other hand, imply the fulfilment of an important requisite, namely that the holder of the trade secret made reasonable efforts to preserve secrecy. These agreements emphasise the importance of non-disclosure, and act as a deterrent to any party who might consider deliberate disclosure. Apart from the holder of the trade secret, a non-disclosure or non-use agreement may also serve the interests of the recipient. Such agreements clearly delineate recipient's rights and obligations in respect to confidential information.

Non-disclosure and non-use agreements have a significant importance for inventions, utility models and designs. A prior disclosure under such an agreement is not novelty destroying, while disclosures not secured by such agreements usually qualify as making the intellectual product public, even in the case of a very limited number of recipients. These agreements secure for the inventor/applicant the ability to disclose the invention, utility model or design, to necessary parties, without compromising novelty before filing the application.

Court precedents show that if a violation occurs, non-disclosure and non-use agreements work to the advantage of the holder of the trade secret in court proceedings (e.g. Decisions of the Supreme Court Nos. Pfv.IV.21.107/2007/5 and Pfv.IV.20.757/2008/15; Decision of the Court of Appeal of Budapest No. 8.Pf.20.027/2009/5). Competition law prevails with regard to enforcing trade secrets.

As already described in point 3 above, an employee has a duty of non-disclosure by law with regard to trade secrets and other sensitive information learned during the employment (Article 103(3) of the Labour Code). This duty remains even after the end of the employment, so no separate unilateral imposition is necessary. The US doctrine of inevitable disclosure does not exist under Hungarian law.

Harmonization

9. *Common and practical definition of trade secret*

The Hungarian Group thinks that in the course of international harmonization the concept of "undisclosed information" as used in the TRIPS Agreement is appropriate to avoid the difficulties arising from the circumstance that the term "trade secret" may have different meanings in different jurisdictions. The TRIPS requirements properly set forth the minimum standards for information to qualify as a trade secret.

In the course of further harmonization, distinction must be made between the protection of factual trade secrets (information, data) and that of knowledge (i.e. know-how). The difference is that know-how (i) is a result of intellectual creation, and (ii) is usually subject to licence agreement while trade secrets relating to mere data and facts cannot be the subject matter of a licence or assignment (see: commercial secrets), save for merger and acquisition transactions. It must also be noted that know-how is licensed usually together with licensing IP rights.

An issue to be analyzed whether the general definition of trade secret shall contain the requirement for a trade secret to be identified, i.e. described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy.

10. *What is desired in your jurisdiction? Also, are there any legal provisions or practices that you may consider to be advantageous in your jurisdiction compared to other countries?*

In Hungarian law, as presented above, the level of protection of trade secrets is higher than that provided by TRIPS. The Civil Code does not require for establishing the infringement to demonstrate that the information was acquired or used "in a manner contrary to the honest commercial practices".

The protection under the Civil Code does not require unfair action of the infringer in connection with violation of trade secret.

It is a specific feature of Hungarian law that it provides special statutory protection for know-how. These rules were introduced into the Civil Code as of 1977. The concept of the rules takes into consideration that know-how is subject to license agreements.

11. *What is required for an improved global standard for trade secret protection?*

The Hungarian Group finds it desirable that the same level of remedies against trade secret violations be available as with infringement of IP rights, both in respect of the enforceable claims and effective procedural rules, including interim measures.

Further, procedural rules relating to the protection of the party's trade secret in the course of the litigation should be harmonized. The lack of harmonization may jeopardize the protection of trade secret, in particular if judicial assistance is sought in different jurisdictions.

12. *What would be a desirable and realistic way to proceed?*

The Hungarian Group considers regional harmonization as a realistic way for harmonization. However, regional harmonization must not undermine and be contrary to the current level of harmonization under TRIPS. Therefore, such harmonization shall be focused on procedural rules to provide effective and quick remedies for the injured party.

13. *Other comments?*

--

Summary

Protection of trade secrets in Hungarian law is granted by civil law, competition law, labour law and criminal law. The protection is in compliance with the requirements of the TRIPS Agreement. Under the unfair competition rules, in the event of trade secret violation, the injured party may enforce similar claims as in case of IP infringement. The rights pertaining to a trade secret belong to the employer by virtue of the labour/service contract. The Civil Code makes a distinction between the protection of factual trade secrets (information, data) and that of knowledge (know-how). The approach to the concept of the know-how will slightly change in the New Civil Code. The new provisions on know-how are not placed among the provisions on IP. Notwithstanding that it is knowledge and therefore an intellectual "product", know-how is defined as a subtype of trade secret.

Zusammenfassung

Der Schutz von Geschäftsgeheimnissen wird im ungarischen Recht durch das Zivilrecht, Wettbewerbsrecht, Arbeitsrecht und Strafrecht gewährleistet. Der Schutz stimmt mit den Anforderungen des TRIPS-Abkommens überein. Im Falle der Verletzung von Geschäftsgeheimnissen kann die verletzte Partei gemäß den Vorschriften des unlauteren Wettbewerbs ähnliche Ansprüche wie im Falle der Verletzung des geistigen Eigentums durchsetzen. Die Rechte betreffend der Geschäftsgeheimnisse sind Eigentum des Arbeitgebers kraft des Arbeitsvertrages / Dienstvertrages. Das Bürgerliche Gesetzbuch macht einen Unterschied zwischen dem Schutz von tatsächlichen Geschäftsgeheimnissen (Informationen, Daten) und dem Schutz von Wissen (Know-how). Die Herangehensweise an das Konzept des Know-how ändert sich leicht in dem neuen Bürgerlichen Gesetzbuch. Die neuen Vorschriften über das Know-how finden sich nicht unter den Vorschriften über das geistige Eigentum. Das Know-how – obwohl es Wissen ist, folglich ein geistiges „Produkt“ – ist als eine Unterart des Geschäftsgeheimnisses definiert.

Résumé

La protection des secrets commerciaux est, dans la législation hongroise, accordée par le droit civil, le droit de la concurrence, le droit du travail et le droit pénal. La protection est en conformité avec les exigences de l'Accord ADPIC. Selon les règles de la concurrence déloyale, en cas de violation de secret commercial, la partie lésée peut faire valoir des sanctions similaires à ceux en cas de violation de propriété intellectuelle. Les droits relatifs à un secret commercial sont la propriété de l'employeur en vertu du contrat de travail ou de service. Dans le Code Civil, il y a une distinction entre la protection des secrets commerciaux de fait (informations, données) et celle de la connaissance (le savoir-faire). L'approche de la notion de savoir-faire changera légèrement dans le nouveau Code Civil. Les nouvelles dispositions relatives au savoir-faire ne sont pas placées parmi les dispositions sur la propriété intellectuelle. Le savoir-faire - même si c'est une connaissance, un "produit" intellectuel - est défini comme un sous-type du secret commercial.
