Date: 16th June 2015

Q247

Trade secrets: Overlap with restraint of trade, aspects of enforcement

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Date	16-06-2015

I. Current law and practice

Aspect (i) - Overlap with restraint of trade

1) Is trade secret protection viewed as a form of restraint of trade and, if so, under what circumstances and under which legal regimes (e.g. competion law)?

no

If not please comment.:

When employees move to new employment they inevitably carry knowledge from their previous employment, including trade secrets. The utilization of the general knowledge of a professional at a new workplace can not be restricted by its nature, since such a restriction would infringe the principle of the freedom to be employed. 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 by a competitor, or the starting of an undertaking which pursues the same business activity as the former employer. However, such agreement must not unduly limit the employee's possibility to find new employment or unduly restrict competition. Nevertheless, trade secret protection is generally not viewed as a form of restraint of trade.

a) If so, under what circumstances and under which legal regimes (e.g. competion law)?

2) How does your law distinguish between general skills or knowledge acquired during the course of

employment, confidential information, and trade secrets? What protection is extended to each?

Section 2:47(1) of the Civil Code defines trade secret as follows: "Trade secrets include any fact, information and other data, or a compilation thereof, connected to economic activities, which are not publicly known or which are not easily accessible to other operators pursuing the same economic activities, and which, if obtained and/or used by unauthorized persons, or if disclosed to others or published is likely to imperil or jeopardize the rightful financial, economic or commercial interest of the owner of such secrets, and provided the lawful owner acted in a manner as may be expected in the given circumstances in order to keep such information confidential." This definition shall also be applied in competition law cases by virtue of Section 4(1) of the Competition Act.

Thus, the information (fact, information, solution or data) that may constitute the content of a trade secret is broadly defined by the above provision of the Civil Code. Hungarian statutory law does not distinguish between general skills or knowledge acquired during the course of employment, confidential information, and trade secrets. The protection depends on the circumstance whether the information falls under the definition.

3) Are employees under a duty of confidence whether or not such a duty is set out in their contract of employment?

yes

If yes please answer the following sub-questions::

a) are express confidentiality clauses to protect classes of information broader than would anyway be protected by the employee's duty of confidence permitted; and

The employee has a general obligation of confidentiality as a part of their employment obligations.

According to Section 8(4) of Act I of 2012 on the Labour Code, the employees shall not disclose any business secrets obtained in the course of their work or any information of fundamental importance pertaining to the employer or its activities. Furthermore, employees shall not convey to unauthorized persons any data learned in connection with their activities which, if revealed, would result in detrimental consequences for the employer or other persons. Consequently, the general rule of the Labour Code provides sufficient protection, even in lack of express confidentiality clauses.

b) how long after the end of employment does an ex-employee's duty of confidence in relation to trade secrets last in the absence of any express confidentiality clause?

There is no statutory time limit: the employee remains bound by duty of confidence in relation to trade secrets after the end of employment, until the undisclosed information falls under the definition of trade secret.

4) If not constrained by an enforceable non-compete agreement, may workers use knowledge acquired in the course of earlier employment in their new employment?

yes

If yes, is there any distinction between the types of knowledge they can use?:

The employees acquire technical, economic and commercial information during the employment. The utilization of this general knowledge of a professional at a new workplace cannot be restricted by its nature, since this knowledge is “in the brain of the employee”. Hungarian court practice expressly

acknowledges that the employees are entitled to use the information which they legally acquired.

5) Are certain employees subject to a higher obligation of confidentiality / non-use?

yes

If so, which employees, and what is the rationale for any distinction between employees?:

Section 3:115 of the Civil Code regulates as a mater of conflict of interest that executive officers may not acquire any share in the capital of a business association - except for the shares of public limited companies, or act as executive officer in such a company - which is engaged in the same economic activity, as the company in which they hold an executive office.

Aspect (ii) - Ensuring confidentiality during Court proceedings

6) What measures or provisions are available to preserve the secrecy of trade secrets during Court proceedings?

For example, do trade secret proprietors have access to the following mechanisms to preserve the secrecy of a trade secret during proceedings (subject to the Court's discretion to allow/disallow such access):

a) restricted access to the hearing and / or evidence;

To preserve the secrecy of trade secrets, restricted access to the hearing or evidence (above a.) may be provided to interested parties while third parties may be fully excluded from hearings and evidence. In other cases, even interested parties may be denied access to documents containing trade secrets.

As regards Court hearings, the main rule is that the Court adjudges civil cases in public hearings. However, under Section 5(2) of the Code of Civil Procedure, the Court may declare in a reasoned statement that the hearing (partly or entirely) be closed from the public, where it is deemed absolutely necessary for the protection of *inter alia* trade secrets.

b) disclosure of evidence only to the legal representatives of the opponent, but not to the opponent themselves;

Concerning the parties' access to documents, under Section 119 of the Code of Civil Procedure, the parties may access documents containing business secrets only subject to a written confidentiality undertaking and according to the rules and under the conditions laid down by the judge hearing the case. If, however, the party entitled to grant an exemption from the obligation of confidentiality made a statement in due time in which he refused to allow access to the document containing any business secret, only the Court is allowed to access the part of the document containing such secrets. In practice, the secrecy of documents shall be announced to the Court. As the Code of Civil Procedure does not provide more guidance, it is subject to the Court's discretion regarding how to allow the access in light of the circumstances of the case.

In patent infringement cases the burden of proof may be overturned. Under Section 19(7) of the Patent Act "*pending proof to the contrary*, *a product shall be deemed to be produced through the patented process if the product is new, or if there is conclusive evidence that the product has been manufactured by the patented process, and the holder of the patent could not define the actually applied process after having taken the steps generally expected in the given situation. Conclusive evidence to verify that the product has been produced by way of the patented process constitutes the probability that it is the only process that has been made available to the public*." In such cases,

the defendant shall prove that his process is different from the patented process, which can only be done by disclosing the process, which in most cases qualifies as a business secret. This may be a case where the defendant requests that it shall be the Court only which will have access to the information. Nevertheless, the Court can decide to oblige the other party to take a confidentiality commitment and set forth rules for reviewing the documents (i.e., that only the legal counsel, and not the employee of the other party, can have access to the file, no copies can be made, etc.).

c) non-confidential versions of documents being provided to all except authorised individuals;

With respect to third parties' access to documents, information on the proceedings may be given to persons with a legitimate interest as to the conduct and the outcome of the proceedings. The presiding judge of the Court seized may authorize access to the documents. However, access to documents containing business secrets may be permitted only to a person indicated in the clearance (exemption) for inspection granted by the secret holder (owner of the business secret).

Witnesses may refuse to give testimony under Section 170 of the Code of Civil Procedure if they are bound to keep business secrets in respect of the subjects, if their testimony would entail their having to breach the obligation of confidentiality. A testimony may not be refused, however, if the secret holder granted an exemption from this obligation to the persons bound to keep business secrets.

d) only non-confidential parts of any judgment / decision publicly available?

The court decisions are published, however, in an anonymous version: the name of the parties and other information relevant to identifying the case are deleted from the published version.

7) If such (or similar) measures are available, do they apply by default, or must the trade secret holder submit sufficient evidence to convince the Court that the information merits protection?

Yes, the secret holder shall notify the Court on the business secret and shall submit sufficient evidence to prove that the information merits protection.

8) Whether or not such measures are available, does the Court restrict the defendant's or claimant's use - after the proceedings have terminated - of the information they gain during the proceedings?

When the Court defines the access to the secret information, it may also state that the information cannot be used by the other party after the proceedings have terminated. However, this can be problematic. E.g. if in a lawsuit the defendant should provide information on a manufacturing process, how can the Court prohibit the use of this manufacturing process by the plaintiff when the plaintiff already had been aware of such process? In this case, the general prohibition on using the disclosed information should not prevent the plaintiff from using such manufacturing process if prior knowledge can be evidenced.

Aspect (iii) - Valuation of loss

9) Are damages available as a remedy for trade secret violation?

yes

If so please answer the following sub-questions::

a) how (if at all) is that value diluted by publication?

Trade secrets have a value as long as they are kept secret or at least not well known. This secrecy is relative in terms that the trade secret might be accessible by a certain group of people, however it is not in the public domain or easily accessible to experts or competitors active in the field concerned. Thus, its value is diluted by publication.

b) how are those damages quantified? Specifically, is allowance made for loss of profits; unjust enrichment; and /or what the trade secret holder would or might have charged as a reasonable royalty fee or licence?

Yes, damages are available as a remedy for a trade secret violation.

A trade secret violation is defined in the Civil Code as a form of violation of personal rights. The aggrieved party may claim payment of damages under the general rules of the Civil Code (including the actual loss and the loss of profits), and claim for the financial advantage acquired by the infringement in accordance with the principle of unjust enrichment.

In 2014, the Civil Code introduced the new sanction called '*sérelemdíj*', which is difficult to translate into English and corresponds to the German expression '*Schmerzensgeld*' (i.e. payment due to the injury, or restitution). The main difference between the previously applicable claim for compensation for non-pecuniary damage and the new remedy is that it is not necessary for the injured party to prove that it suffered non-pecuniary damage (detriment). However, to date there has been no court practice on the new remedy.

Trade secrets are also protected by the Competition Act if the trade secret was violated by a market player and had a commercial effect. Sanctions available are of a similar nature as in the Civil Code, with the exception that the aggrieved party may claim against the enrichment of the infringer, without reference to the application of the rules of unjust enrichment.

Damages are quantified in a similar manner when the case falls under either competition law or under civil law. The reimbursement of loss of profits is applied in both cases.

Unjust enrichment may be claimed in civil law cases. The aggrieved party may apply for unjust enrichment if he or she suffered a pecuniary disadvantage as a consequence of the infringement.

Under competition law, the aggrieved party may claim a reasonable royalty or license that he or she might have charged - even in the case where he or she has not suffered a pecuniary loss (“fictive license”).

When claiming damages in connection with a trade secret violation, providing proof of damage involves proving all elements required by civil law concerning the establishment of the latter. It must be proven that the activity of the other party was unlawful, that the concerned party suffered damage and that there is a direct link between the unlawful activity of the other party and the damage suffered by the concerned party. Lack of proof of that direct link excludes the liability for damages of the other party (decision No BH+ 2009.12.556 of the Supreme Court).

c) can damages be awarded for moral prejudice suffered by the trade secret holder? If so, how is moral prejudice defined, and how are such damages quantified?

yes

Please comment:

The term “moral prejudice” was used in the Hungarian legal terminology until the new Civil Code

came into effect. As of 15 March 2014, Section 2:53 of the Civil Code introduced a - partially new legal instrument, the “restitution”. The new law aims to resolve the controversy of the previous regulation, namely that under Hungarian law the aggrieved party should have quantified and proved the amount of compensation for his non-pecuniary loss, even though non-pecuniary loss by its nature is hard to value in monetary terms.

d) If so, how is moral prejudice defined and how are such damages quantified?

According to Section 2:52 of the Civil Code, any person whose rights relating to personality have been violated shall be entitled to restitution for any non-material violation suffered. Apart from the fact of the infringement, no other harm has to be verified for entitlement to restitution. The court shall determine the amount of restitution in one sum, taking into account the gravity of the infringement, whether it was committed on one or more occasions, the degree of responsibility, the impact of the infringement upon the aggrieved party and its environment. Due to the new regulations, there is no established court-practice available, yet.

Aspect (iv) - Proving infringement

10) What elements must be proved to establish violation of a trade secret?

The party claiming a violation of trade secrets shall prove the following:

i) whether the data at issue qualifies as a trade secret;

ii) that the trade secret has been accessed or obtained in an unfair manner (see: decision No BH2004.151 of the Supreme Court).

It is important that any measure concerning a violation of trade secrets pursuant to the Competition Act – including preliminary injunctions and protective measures - may only be initiated within 6 months of knowledge of the violation being gained and within three years of the violation itself.

When establishing whether the data embodying a trade secret has been accessed in an unfair manner, the consistent judicial practice requires proof that the party holding such data has indeed made all reasonable efforts to keep the data embodying trade secrets confidential (decision No P.630793/2003/53 of the Metropolitan Tribunal and decision No 8.Pf.20.027/2009/5 of the Metropolitan Appeal Court). According to the court’s reasoning, binding all personnel who were “in a position of trust” by signing confidentiality agreements is considered sufficient. It is not required of the party to bind all its partners with confidentiality agreements.

The aggrieved party has to prove outright, beyond doubt, without the help of a court expert, that the other party has indeed obtained its trade secrets in an unfair manner. In decision No BH2009.154, the Supreme Court confirmed the standpoint of the lower courts when they refused to instruct a computing court expert to extract information from the computer system of the defendant in order to prove that it has indeed obtained the data containing the trade secrets unfairly. The Supreme Court concluded that the court expert should not be involved with the sole purpose of finding proof to support the claims of the parties.

11) What additional elements must be proved (if any) for a trade secret violation in comparison to a breach of confidence, to the extent those are different types of violations?

Under Hungarian law, there is a single type of violation. However, the circumstances under which the data containing trade secrets was obtained shall be examined closely. In decision No BDT2002.711 the

Supreme Court dealt with the issue of trade secret violation between two companies that worked in close business cooperation. It was established that the obtaining and use of data that would otherwise, by legal definition, qualify as a trade secret – the name and address of the business partners of one of the companies – shall not be considered unfair if the other company has obtained and used such while performing its contractual obligations, even after the business relationship between the two companies has ended. In relation to this decision, the Supreme Court also established that, by using such data for the purpose of merely informing customers of the end of the business cooperation between the two companies and the actions to be taken in this regard, this shall not be considered unfair.

12) Can constructive knowledge of a trade secret by an ex-employee or a new employer be imputed, e.g. if the subject-matter of that ex-employee's work was closely linked to the trade secret?

yes

If so, in what circumstances? :

As a general rule, no legal provision restricts ex-employees from having and using the constructive knowledge, even if a trade secret, accumulated during the previous employment relationship. However, employment law rules defined below exclude the use or disclosure of such information if it is detrimental to the ex-employer.

Pursuant to Section 8 (1) of the Labour Code, employees shall maintain confidentiality in relation to business secrets obtained in the course of their work, also they shall not disclose 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. The official explanatory note of the Labour Code explains that such obligation of confidentiality binds the employee without temporal limitation. It is emphasized that only disclosure or use that is detrimental to the ex-employer is banned; the employee may disclose or use the trade secrets in his or her new employment relationship if this is not detrimental to the ex-employer. This is confirmed by judicial practice – decision No BDT2012.2720 of the Szeged Appeal Court – which establishes that the ex-employer may not object to its ex-employees using the knowledge and trade secrets lawfully obtained during their previous employment in their new, similar employment. The only way an employer may ban its employees from taking up similar positions in rival companies once their current employment relationship has ended is via a non-competition agreement (see below).

13) Does your jurisdiction provide for discovery?

no

14) Does the burden of proof switch to the defendant if the applicant is able to demonstrate, to a certain level of probability, that there has been a violation?

yes

If yes, what is this threshold?:

Yes, it does. Pursuant to Section 88 (6) of the Competition Act, where a party in a legal action filed in connection with any infringement of the provisions concerning the protection of trade secrets (among others) has already substantiated its statements to a reasonable extent, the court may require, upon the request of the party providing proof, that the other party present and allow for review the documents and other physical evidence in his possession; and/or make mention of and present bank, financial or commercial information and documents in his possession.

15) Does your law provide for any other methods for securing evidence, such as seizures or ex parte measures?

yes

If so, what requirements must be fulfilled in order for the measure to be ordered and what safeguards are in place to prevent abuse?:

Yes, both seizures and ex parte measures are available. However, we are not aware of any court case where an ex parte measure had been ordered.

Protective measures, such as seizures, are allowed by the Competition Act. Pursuant to Section 88 (5) of the Competition Act, in lawsuits filed in connection with the violation of trade secrets the concerned party - apart from the civil claims available - may request the court to order protective measures, under the conditions applicable to preliminary injunctions, in accordance with the provisions laid down in Section 185 of Act LIII of 1994 on Judicial Enforcement, if the former is able to verify that any subsequent attempt at the recovery of gains made from the infringement or the payment of damages is in jeopardy. Such protective measures are the pledging of security for money claims and also the seizure (sequestration) of goods. The party may also demand that the infringer be compelled to make mention of and present bank, financial or commercial information and documents for the purpose of ordering the protective measures.

Seizure may be applied based on a first instance, enforceable preliminary injunction order, regardless of appeal. As such, the concerned party has to prove that it has a claim on a non-final but enforceable court order. Beyond that, the party has to prove that the recovery of the gains or the object of the suit is in jeopardy. Such jeopardy includes impending judicial enforcement (decision No BH2001.23), a liquidation procedure (decision No BH2001.486), or the real estate securing the debt being contractually bound to secure other debts of the same debtor (decision No BH2001.331), among others. On the other hand, the jeopardy as a prerequisite cannot be established if the party has allowed the debtor an extension of to their payment deadline if such has not yet passed (decision No BH2002.192), or if the party merely has hearsay information, obtained in separate proceedings, of the financial difficulties of the debtor (decision No BH2001.24).

For the sake of effectiveness, an order instituting seizure is not served on the obliged party by the court via the official channel, but instead directly by the court bailiff when effectuating the seizure (decision No BH2003.462). It is important that seizure may only be instituted if the original subject of the claim was an object that can be seized; money claims may only be protected by a pledge of security (decision No BH2002.151).

Ex parte relief may be sought where any delay is likely to cause irreparable harm. It is considered in the case of extreme urgency, and provisional measures - including preliminary injunctions and protective measures - may be ordered without the other party having been heard.

Additionally, where any delay is likely to cause irreparable harm or where there is a demonstrable risk of evidence being destroyed, it shall be treated as a case of urgency, and measures to preserve evidence may be ordered without the other party having been heard.

Where any decision is adopted without the other party having been heard, the other party shall be given notice when the decision is executed. Upon being notified of the decision, the other party affected may request to be heard and may request that the decision ordering the provisional measures or the measures to preserve evidence be modified or revoked.

To secure evidence before or during a lawsuit, the party may initiate a procedure for the preliminary collection of evidence. Pursuant to Section 88 (7) of the Competition Act, measures to preserve evidence may be implemented before court proceedings are instituted, if the concerned party has already substantiated to a reasonable extent the infringement of trade secrets or the threat thereof. Decisions ordering measures to preserve evidence may be appealed. Similarly to preliminary injunctions, measures can be repealed by the court at the request of the other party, if the petitioner fails to file a main lawsuit within 15 days of the receipt of the order initiating such measures.

Judicial practice – decision No 8.Pkf.27.151/2014/3 of the Metropolitan Appeal Court – establishes that the objective of the preliminary collection of evidence shall solely be to safeguard and record evidence with the intention of preserving such evidence during the procedure, so it may be considered at a later stage. However, the preliminary collection of evidence may only be used to support a claim which has already been filed (like the establishment of infringement) and not to help the claimant to determine the extent it could claim (like assessing the sum of enrichment gained by infringement, yet to be claimed).

16) Where seizure is available, for what purposes can it be used? To secure evidence, to prevent items entering into circulation or for other reasons?

In decision No BH2002.151 cited above, the Supreme Court established that only the subject of the claim may be seized; documents that were not subject to the original claim but may facilitate enforcement may not be protected by such measures. Consequently, seizure shall only be used to secure evidence for claims already filed. This is in line with decision No 8.Pkf.27.151/2014/3 of the Metropolitan Appeal Court concerning the preliminary collection of evidence – measures to collect or secure evidence are only considered well-founded if the claim to be supported by means of that evidence has already and definitely been filed.

II. Policy considerations and proposals for improvements of the current law

Aspect (i) - Overlaps with restraint of trade

17) Should limits be placed on the protection of trade secrets to avoid unlawful restraints on trade?

yes

If so, what limits? :

The protection of trade secrets must not unduly limit the employee's possibility to find new employment. Limitation can be applied only if the acquisition and use of the information by the new employer is considered as unfair practice.

18) Should different obligations of confidence / non-use apply to different employees? Why/why not?

There is no need to apply different obligations of confidence / non-use obligation to different employees. In order to protect the interest of the proprietor of the trade secret, all employees shall have the general obligation of confidentiality as a part of their employment obligations. In case of executive officers, the rules on conflict of interest can provide further guidance to avoid the unfair use of the information.

Aspect (ii) - Ensuring confidentiality during Court proceedings

19) Should a defendant, who is sued unsuccessfully for a trade secret violation, and who learns of the trade secret during the course of the litigation, be required to not use the trade secret after the proceedings? Why/why not?

Yes. In such a situation, the defendant should be prohibited from using the disclosed information unless he can prove that he had already been aware of such information (from another source or through parallel development).

20) Should such obligations of confidentiality attach to information that the defendant developed independently prior to the trade secret proceedings, or develops independently after the trade secret proceedings? Why/why not?

The defendant shall not be prevented from using the information that he developed independently prior to the proceedings.

Aspect (iii) - Valuation of loss

21) Should damages as a remedy be available by default, or only where injunctive relief is (a) not possible, (b) adequate, or (c) not necessary? If by default, why?

yes

If yes please answer the following sub-questions::

a) only where injunctive relief is not possible?

no

If not please comment.:

b) only where injunctive relief is not adequate

no

If not please comment.:

c) only where injunctive relief is not necessary?

no

If not please comment.:

d) If by default, why?

According to the laws of Hungary, damages as a remedy are available independent from the fact of whether injunctive relief is possible, adequate or necessary.

Both damages and injunctions are available upon the request of the aggrieved party. These are independent claims.

Aspect (iv) - Proving infringement

22) Should constructive knowledge of a trade secret by an ex-employee be imputed to their new employer?

yes

If yes, in what circumstances? :

As set forth above, the protection of trade secrets must not unduly limit the employee's possibility to find new employment. Limitation can be applied only if the acquisition and use of the information by the new employer is considered as unfair practice, i.e., solicitation of the competitor's employees. In such case, the constructive knowledge of a trade secret by an ex-employee can be imputed to their new employer.

23) Availability of pre-action evidence orders and seizure orders.

a) Should pre-action evidence preservation orders be available?

yes

If so, should the hearings to decide whether or not to grant them be able to take place ex parte?:

For the effective enforcement it is absolutely necessary that pre-action evidence preservation orders and seizure orders shall be available.

b) Should pre-action evidence seizure orders be available?

yes

If so, should the hearings to decide whether or not to grant them be able to take place ex parte?:

In case of urgency, or there is a threat that the evidence will be destroyed, such orders shall be granted ex parte. The same reasons support this position as in case of IP protection.

24) What if the claimant learns of new trade secrets (of the defendant) during the course of a seizure?

The trade secret proprietor must not enforce its claim in abusive manner.

The court shall prevent such abusive actions. On the request of the defendant, the court shall establish how the plaintiff can get access to the information. On the other hand, the plaintiff shall not be prevented from using the information that he developed independently prior to the proceedings, provided that he can prove that he had already been aware of such information.

III. Proposals for harmonisation

25) Is harmonisation in this area desirable?

Harmonisation of national laws is desirable in the field of protection of trade secret, similarly to IP protection (even if the field of protection of trade secret does not belong to IP law). The Hungarian group agrees with the reasons of the proposal for an EU directive.

If yes, please respond to the following questions without regard to your national or regional laws. Even if no, please address the following questions to the extent you consider your national or regional laws could be improved.

Aspect (i) - Overlaps with restraint of trade

26) Please propose principles for the circumstances in which trade secret enforcement actions should fail, because such actions would be de facto restraints of trade.

As set forth above, the protection of trade secrets must not unduly limit the employee's possibility to find new employment. If the employer wants to limit the employee to get employment at the competitor, this limit can be imposed for a limited period of time, and the employer shall pay adequate remuneration.

On the other hand, even if the employee can freely change its job, unfair market practices shall be prohibited (solicitation of the competitor's employees).

27) What relief should courts give when a trade secret violation has occurred or is about to occur, but an enforcement action is barred as a restraint of trade?

In case of trade secret violation, we do not consider the enforcement action as a restraint of trade. The proprietor shall be entitled to enforce the respective claims against the infringers.

28)	Should employees subject to a stricter obligation of confidentiality be released from that duty in certain circumstances? If so, in what circumstances?

In our view, all employees shall be bound by high level obligation of confidentiality. They cannot be released from such duty. However, this does not mean that they cannot be prevented from using the knowledge which is "in their brain".

Aspect (ii) - Ensuring confidentiality during Court proceedings

29)	What protection for trade secrets should be available during Court proceedings, and what conditions should be satisfied for that protection to be given?

The present regulation on trade secrets in Court proceedings is in general acceptable, the judge shall has the discretion to set forth the rules of access to the information in light of the circumstances of the case. The procedural rules shall contain the possibility that experts should be allowed access to the secret information alongside the Court.

30)	If an enforcement action fails (e.g. because the defendant had independently developed the secret information and did not misappropriate it), what type(s) of confidentiality or non-use obligation, if any, should continue or cease to apply?

The plaintiff should be prohibited from using the disclosed information unless he can prove that he had already been aware of such information (from another source or through parallel development).

Aspect (iii) - Valuation of loss

31)	Please propose the principles for quantifying damages for trade secret violations.

The present regulation seems to be adequate for quantifying damages. The aggrieved party shall be entitled to claim damages according to the principle of civil law, and/or claim unjust enrichment. The method used in IP matters shall be used mutatis mutandis for quantifying damages for trade secret violations. As mentioned above, the new Hungarian regulations on moral damages may mean that judges face challenges in elaborating a coherent practice.

32)	Should courts award moral damages?

yes

If so, how should they be quantified?:

As mentioned in Question 9) c., in the case that the fact of the infringement is proved, the court shall determine the amount of restitution, taking into account all relevant circumstances of the case.

This approach seems to be adequate, however restitution is not meant to have, and should not develop, a punishing function; that is, courts must avoid applying it as a kind of “punitive damages.”

Aspect (iv) - Proving infringement

33)	What measures to secure or preserve evidence should be available?
	The court shall be entitled to take precautionary measures to secure or preserve evidence, even in ex parte proceedings, subject to adequate guarantees to preclude abusive enforcement. The IP enforcement rules shall be used as a model for such proceedings.

34)	What restrictions should apply to the use of seized evidence by the claimant?
	The claimant shall be limited to use the seized evidence exclusively for the pending proceedings in order to support its claim. The court shall set rules on the access to the documents containing confidential information.

Summary

Harmonisation of national laws is desirable in the field of protection of trade secret, similarly to IP protection (even if the field of protection of trade secret does not belong to IP law).

The protection of trade secrets must not unduly limit the employee's possibility to find new employment. If the employer wants to limit the employee to get employment at the competitor, this limit can be imposed for a limited period of time, and the employer shall pay adequate remuneration. On the other hand, even if the employee can freely change its job, unfair market practices shall be prohibited (solicitation of the competitor's employees).

In the enforcement procedure, effective remedies shall be granted against the infringer. The actions cannot be abusive, and the courts shall provide adequate guarantees to preserve the confidential information in the course of the proceedings.

Please comment on any additional issues concerning trade secrets you consider relevant to this Working Question.