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Question B: The Protection of Trade Secrets and Know-How

Are countries providing enough or too much protection?

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References and abbreviations:

APA	Act CXL of 2004 on the General Rules of Administrative Procedures and Services
Civil Code	Act IV of 2013 on the Civil Code
Competition Act	Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices
Code of Civil Procedure	Act III of 1952 on the Code of Civil Procedure
Criminal Code	Act C of 2012 on the Criminal Code
Data Protection Act	Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information
HCA	Hungarian Competition Authority (<i>Gazdasági Versenyhivatal</i>)

1. Legal protection of trade secrets

Hungarian law contains specific provisions on trade secrets. The protection is manifold: trade secrets enjoy protection *inter alia* under civil law, competition law, criminal law and various procedural laws. The notion of 'trade secrets' is identical in the civil and competition law regimes.¹ In the Civil Code, trade secrets are considered as a subcategory of 'private secrets' and are regulated as a type of personality rights. Know-how, which is referred to in the Civil Code as a 'protected interest', is a subcategory of trade secrets to which specific rules apply.²

1.1 The notion of trade secrets

Under the Civil Code, the following conditions must be fulfilled in order for the provisions of trade secrets to apply.³

1.1.1 Subject matter of protection

Trade secrets include any fact, information and other data, or a compilation thereof, which is not publicly known or which is not easily accessible to other operators pursuing the same economic activities. It is sufficient if the fact, information or data are relatively secret, *i.e.* available to a limited number of people.⁴ If the information is in the public domain, the protection is excluded.⁵

1.1.2 Connection to economic activities

The secret must relate to the owner's economic activities; however, the commentaries suggest a broad interpretation of this requirement. It is not necessary that the economic activities are aimed at profit making, therefore associations and foundations may also have trade secrets.⁶

1.1.3 Violation of the owner's lawful interests

As a further condition of protection, the obtaining and/or the using of the secret by unauthorized persons, its disclosure to others or publishing it must imperil or jeopardize the rightful financial, economic or commercial interest of the owner of such secrets. In short: the secret must be significant.⁷

¹ 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. The Criminal Code and the procedural codes do not contain any specific definition, therefore the above definition is applicable for the purposes of these laws as well.

² Section 2:47(2) of the Civil Code.

³ Section 2:47(1) of the Civil Code.

⁴ G. Bacher, 4. § In: M. Juhász, D. Ruzshtiné Juhász, A. Tóth, Kommentár a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról szóló 1996. évi LVII. törvényhez, HVG Orac, 2015, pp. 68-69.

⁵ G. Faludi, Az üzleti titok és a know-how (védett ismeret). In: L. Vékás (ed.): A Polgári Törvénykönyv Magyarázatokkal, Complex 2013, p. 61.

⁶ G. Faludi, 2:47. § In: L. Vékás, P. Gárdos (eds), Kommentár a Polgári Törvénykönyvhöz, Wolters Kluwer, 2014, pp. 150-151.

⁷ G. Faludi, Az üzleti titok és a know-how (védett ismeret). In: L. Vékás (ed.): A Polgári Törvénykönyv Magyarázatokkal, Complex 2013, p. 62.

1.1.4 Duty to keep confidential

The owner of the trade secret must act in a manner as may be expected in the given circumstances in order to keep the subject matter of the secret confidential. This corresponds to the requirement under the TRIPS that the trade secret must be subject to reasonable steps made under the circumstances, by the person lawfully in control of the information, to keep it secret.⁸

1.1.5 Special rules on know-how

In the case of know-how, which is a subcategory of trade secrets, protection is afforded to technical, economic and other practical knowledge of value held in a form which enables identification, including accumulated skills and experience and any combination thereof.⁹

1.2 Protection of trade secrets in the Civil Code

Pursuant to the Civil Code, trade secrets are protected against all unlicensed acquisition, disclosure, making public or use (exploitation). The existence of a breach is independent from the culpability of the party in breach (*i.e.* whether or not the party in breach acted wilfully or negligently). As an exception, the protection does not apply against *bona fide* third parties who acquired the trade secret in the course of trade, for consideration.¹⁰ It follows *a contrario* that trade secrets are protected against third parties to whom the secret is disclosed by someone other than the secret's owner.

The protection of know-how is much narrower. The Civil Code protects only against acquisition, use (exploitation), making public and disclosure or publishing if this act is committed in violation of the principle of good faith and fair dealing (*Treu und Glauben*). In addition to the general exception of *bona fide* third parties indicated above, there are two specific exceptions to the protection of know-how. It is not prohibited to obtain the know-how, or any knowledge which is essentially a substitute of the know-how which has the same attributes, by means of independent development or reverse engineering of the lawfully acquired product or lawfully received service incorporating the know-how.¹¹

1.3 Protection of trade secrets in the Competition Act

The Competition Act prohibits the unfair acquisition and use, and the unauthorised disclosure or making public of trade secrets.¹² In particular, unfair acquisition of trade secrets takes place where access to the trade secrets has been obtained without the owner's consent through a party in a business relationship or a confidential relationship with the owner. Business relationships extend to information given in the course of negotiations and bidding, if no contract was concluded afterwards. Persons in confidential relationships encompass employees, persons performing work by way of a similar contract and members (shareholders) of a company.¹³ Thus, if an ex-employee discloses the trade secret of its former employer to the new employer, this will qualify as a breach of trade secrets under the Competition Act. The new employer may act either *bona fide*, in this case there is no trade secret infringement on his side, or may share the unfairness of the ex-employee and may be

⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Art. 39(2)(c).

⁹ Section 2:47(2) of the Civil Code.

¹⁰ Section 2:47(3) of the Civil Code.

¹¹ Section 2:47(2) of the Civil Code.

¹² Section 4(1) of the Competition Act.

¹³ Section 4(2) of the Competition Act.

held liable for the infringement. However, unless acting upon their own account, natural persons (such as employees or shareholders) are not considered as economic operators under the provisions of the Competition Act, therefore their employer, as an undertaking, shall be liable for their conduct.¹⁴ According to the court practice, it is not prohibited for the employees to use their technical, business and commercial knowledge acquired when they worked at their previous employers.¹⁵ The former employee may protect its trade secrets by concluding a non-compete agreement with the employee, but this agreement must not unduly limit the employee's possibility to find new employment or unduly restrict competition.¹⁶

1.4 Trade secrets in other pieces of legislation

There are several other pieces of legislation which contain provisions related to trade secrets. We can mention the procedural codes,¹⁷ the labour code¹⁸ and the Data Protection Act, amongst others. Trade secrets also enjoy the protection of criminal law: breach of trade secrets is a crime punishable with imprisonment of up to three years, while prohibited access to information (including trade secrets) may be punishable with imprisonment of up to five years.¹⁹

2. Procedural aspects and remedies in the event of trade secret misappropriation

2.1 Burden of proof

As a general rule, the trade secret proprietor has to prove all the facts which it relies on, *i.e.* those facts in the case of which it is in the proprietor's interest that the Court accepts them as true.²⁰ The plaintiff has to prove the existence of trade secret protection, as well as the defendant's conduct forming the basis of the plaintiff's claim.²¹ The court practice emphasises that the trade secret proprietor has the burden of proof to prove that, in particular, it is the proprietor of the information;²² the information is connected to a commercial activity;²³ the information is kept secret and that the proprietor took the necessary measures to keep the information confidential.²⁴ A legal action claiming trade secret infringement, without specifications and without specific details of the protected information, is not admissible.²⁵

If the trade secret proprietor brings a damages claim against the infringer, the trade secret proprietor has to prove the conditions of its claim for damages, in particular the existence and amount of the damage and the causal link between the infringement and the damage. Once the preconditions of the damages claim are proved, it is for the infringer to exculpate itself, the rules of which are different in the case of contractual and extra-contractual liability (see Section 2.4 below).²⁶

¹⁴ See 6:540 of the Civil Code, as well as the milestone decisions EBH 2002.640, BH+ 2007.3.132, BH+ 2009.12.556.

¹⁵ Cases no. BDT 2012. 2720., BH 1995. 231., BH 1997. 407. and BDT2010. 2248.

¹⁶ Case no. ÍH 2015.13.

¹⁷ See Act XIX of 1998 on Criminal Proceedings, the APA and the Code of Civil Procedure.

¹⁸ Sections 8 and 228 of Act I. of 2012 on the Labour Code.

¹⁹ Sections 418 and 422 of Act C of 2012 on the Criminal Code.

²⁰ Section 164(1) of the Code of Civil Procedure.

²¹ Case no. BH+ 2011.3.121.

²² Case no. BH 2002.52.

²³ Case no. BH+ 2013.7.277.

²⁴ Case no. BH+ 2014.7.296.

²⁵ Case no. BH+ 2012.12.507.

²⁶ Sections 6:142. and 6:519. of the Civil Code.

2.2 Securing evidence

Before filing a trade secret infringement lawsuit based on the Civil Code, the trade secret proprietor may initiate a preliminary evidence taking procedure either before the court²⁷ or a notary public.²⁸ Such a procedure may be initiated if it is probable that the evidence taking will not be successful or would be substantially impaired later in the course of the lawsuit.²⁹ Alternatively, preliminary evidence taking may also take place if it is probable that it facilitates the timely finishing of the lawsuit.³⁰ The trade secret proprietor may choose to apply for preliminary evidence taking before a notary if any of the above conditions are fulfilled, or if it has a legal interest in obtaining the evidence.³¹ If the trade secret infringement lawsuit has already been initiated, it is only the court which is competent for preliminary evidence taking.³²

If the lawsuit is based on the Competition Act, the trade secret proprietor may secure and obtain evidence more easily than in a lawsuit based merely on the Civil Code. In the case of a lawsuit brought under the Competition Act, preliminary evidence taking is always allowed if the trade secret proprietor demonstrated the fact of the trade secret infringement or the threat thereof to the extent required (*i.e.* made it probable, actual proof is not required).³³ What is more, the trade secret proprietor may request the court to issue interim measures and oblige the defendant to provide banking, financial and commercial data, as well as the relevant documents.³⁴ Finally, if any of the parties to the lawsuit has demonstrated its statements to the extent required, the court may oblige the other party to produce documents or objects in its possession or to enable their inspection, and to provide banking, financial and commercial data and the documents pertaining to such data.³⁵

Hungarian law does not provide for a system of discovery. The court may order a party to produce documents which the opposing party is entitled to based on the rules of civil law, in particular if the document was issued for the opposing party's benefit or proves a legal relationship with the opposing party or pertains to negotiations related to such legal relationship. If the document is in a third party's possession, the third party has to be summonsed as a witness and then ordered to show the document.³⁶ The limited possibility to obtain documents from the other party urged the legislator to adopt special rules in the case of trade secret lawsuits based on the Competition Act. These special rules are inspired by the so-called EU Enforcement Directive.³⁷

2.3 Interim measures

If the trade secret infringement lawsuit is based on the Civil Code, interim measures may be obtained in order to prevent any imminent threat of damage, to preserve the *status quo* giving

²⁷ Sections 207-211 of the Code of Civil Procedure.

²⁸ Sections 17-20 of XLV of 2008 on certain notarial non litigation proceedings.

²⁹ Section 207(a) of the Code of Civil Procedure.

³⁰ Section 207(b) of the Code of Civil Procedure.

³¹ Sections 17(1)(b) of XLV of 2008 on certain notarial non litigation proceedings.

³² Section 208(1) of the Code of Civil Procedure.

³³ Section 88(7) of the Competition Act.

³⁴ Section 88(5) of the Competition Act.

³⁵ Section 88(6) of the Competition Act.

³⁶ Section 190(2)-(3) of the Code of Civil Procedure.

³⁷ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, Art. 6. Á. Tibold, 88. §. In: M. Juhász, D. Ruszthiné Juhász, A. Tóth, *Kommentár a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról* szóló 1996. évi LVII. törvényhez, HVG Orac, 2015, p. 714.

rise to the dispute or to protect the plaintiff's rights requiring special legal appreciation. As a further condition, disadvantages of the interim measures obtained on the defendant's side cannot supersede the advantages to be gained on the plaintiff's side. The plaintiff must demonstrate the facts underlying its request for interim measures (*i.e.* make them probable, actual proof is not required).³⁸ Interim measures may not be requested before filing the statement of claims.³⁹ As a general rule, the Court gives the opportunity to the defendant to reply to the plaintiff's request for interim measures. However, in the case of extreme urgency, the court may grant interim measures *ex parte* (*i.e.* without asking or hearing the opposing party).⁴⁰ We note that *ex parte* interim measures are extremely rare.⁴¹

If the trade secret infringement lawsuit is based on the Competition Act, special rules apply to interim measures which provide more effective protection to trade secret proprietors. First of all, interim measures may be requested before filing the statement of claims,⁴² and it is sufficient to file the statement of claims within 15 days as of the court's decision on interim measures.⁴³ The court has to decide on the request for interim measures within 15 days, and in case of an appeal, the second instance court also has 15 days to render its decision.⁴⁴ What is more, the court may decide on the request for interim measures *ex parte* if the delay would cause irreparable damage or if there is a probable risk of destroying evidence.⁴⁵ Finally, in its decision on interim measures, the court may in particular order the seizure of goods and materials used in connection with the infringing conduct.

Furthermore, the trade secret proprietor may request the court to grant precautionary measures if is able to demonstrate that any later attempt to satisfy its claim for damages or restitution of the unjust enrichment achieved through the infringement is endangered.⁴⁶ Protective measures may consist of securing a monetary claim or the seizure of assets.⁴⁷ Securing monetary claims means that the debtor has to pay the secured amount to the bailiff as a security; otherwise, the bailiff may seize the debtor's assets or block the respective amount on the debtor's bank account.⁴⁸

2.4 Remedies in the case of a breach of trade secrets

2.4.1 Objective remedies

On the basis of the Civil Code, a trade secret qualifies as a personality right, therefore the same remedies are available in the case of trade secret misappropriation as in the case of the infringement of any other personality rights. The majority of these remedies are 'objective', *i.e.* independent of the infringer's culpability (intention or negligence).⁴⁹ First of all, the trade secret proprietor may request the court to declare that there has been an infringement of trade

³⁸ Section 156(1) of the Code of Civil Procedure.

³⁹ Section 156(2) of the Code of Civil Procedure.

⁴⁰ Section 156(4) of the Code of Civil Procedure.

⁴¹ We are aware of only one such published case (no. BDT 2011. 2418, which was not a trade secret infringement case).

⁴² Section 88(8) of the Competition Act.

⁴³ Section 88(10) of the Competition Act.

⁴⁴ Section 88(9) of the Competition Act.

⁴⁵ Section 88(11) of the Competition Act.

⁴⁶ Section 88(5) of the Competition Act, Sections 185-189 of Act LIII. of 1994 on judicial enforcement.

⁴⁷ Section 185 of Act LIII. of 1994 on judicial enforcement.

⁴⁸ Sections 191-192 of of Act LIII. of 1994 on judicial enforcement.

⁴⁹ L. Székely, Személyiségi jogok. In: L. Vékás, P. Gárdos (eds), *Kommentár a Polgári Törvénykönyvhöz*, Wolters Kluwer, 2014, p. 168.

secrets rights.⁵⁰ The proprietor may also request the discontinuation of the infringement and the restraining of the infringer from further (future) infringements.⁵¹ It is possible to request the infringer to give appropriate satisfaction, which is in most cases a public statement acknowledging the infringement and apologising for it.⁵² The infringer may be obliged to terminate the situation resulting from the infringement, to restore the original *status quo* which prevailed before the infringement, and to destroy the things produced as a result of the infringement or to deprive them of their infringing nature.⁵³ As a new objective remedy introduced by the Civil Code, the court may order the infringer or its successor to surrender the financial advantage acquired as a result of the infringement, according to the principle of unjust enrichment.⁵⁴

On the basis of the Competition Act, additional remedies are available. The trade secret proprietor may demand destruction of any special devices and facilities used for the manufacture or production of infringing products,⁵⁵ and it may also request the court to order the defendant to disclose information about the parties participating in the manufacturing and marketing of the infringing products and about the business relations it has established to distribute such products.⁵⁶ The trade secret proprietor may demand the seizure of the means and materials used solely or primarily for the infringement, as well as the products affected by the infringement, or demand to have them handed over to specific persons, or recalled or withdrawn from commercial circulation, or destroyed.⁵⁷ In addition, the trade secret proprietor may demand to have the court's resolution disclosed at the expense of the infringer, e.g. its publication in a national daily newspaper or on the internet.⁵⁸ Finally, the trade secret proprietor may claim restitution of gains obtained as a result of the infringement.⁵⁹ However, this restitution claim is different from the one based on the Civil Code. In the case of the restitution claim based on the Competition Act, the rules on unjust enrichment do not apply. This means that restitution may be claimed even if the trade secret proprietor did not suffer any loss. In such case, the amount of the restitution would be equal to the license fee which would have been applied had the trade secret proprietor given authorisation to the infringer in advance (a so-called fictive license fee).⁶⁰

It is important to note that the trade secret proprietor may choose to bring its claim on the basis of either the Civil Code or the Competition Act.⁶¹

2.4.2 Subjective remedies: damages

On the basis of both the Civil Code and the Competition Act, the trade secret proprietor may claim compensation for its pecuniary⁶² and non-pecuniary damage.⁶³ These are 'subjective'

⁵⁰ Section 2:51(1)(a) of the Civil Code.

⁵¹ Section 2:51(1)(b) of the Civil Code.

⁵² Section 2:51(1)(c) of the Civil Code, L. Székely, Személyiségi jogok. In: L. Vékás, P. Gárdos (eds), *Kommentár a Polgári Törvénykönyvhöz*, Wolters Kluwer, 2014, p. 169.

⁵³ Section 2:51(1)(d) of the Civil Code.

⁵⁴ Section 2:51(1)(e) of the Civil Code.

⁵⁵ Section 86(2)(d) of the Competition Act.

⁵⁶ Section 86(2)(g) of the Competition Act.

⁵⁷ Section 86(3)(b) of the Competition Act.

⁵⁸ Section 86(3)(c) of the Competition Act.

⁵⁹ Section 86(3)(a) of the Competition Act.

⁶⁰ G. Bacher, 4. § In: M. Juhász, D. Ruzshtiné Juhász, A. Tóth, *Kommentár a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról szóló 1996. évi LVII. törvényhez*, HVG Orac, 2015, pp. 74-75.

⁶¹ G. Bacher, 4. § In: M. Juhász, D. Ruzshtiné Juhász, A. Tóth, *Kommentár a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról szóló 1996. évi LVII. törvényhez*, HVG Orac, 2015, p. 74.

⁶² Section 2:53 of the Civil Code, Section 86(2)(e) of the Competition Act.

⁶³ Section 2:52 of the Civil Code, Section 86(2)(e) of the Competition Act.

remedies because the infringer may exculpate itself. The rules of exculpation are different in case of contractual and extra-contractual liability. If the infringement of trade secrets is independent from any contract between the parties, the rules of extra-contractual liability apply. In this case, the infringer (tortfeasor) may exculpate itself by proving that it acted in a manner which may be generally expected in the given situation.⁶⁴ Practically, this means that it did not act either wilfully or negligently. On the other hand, if the infringement of trade secrets was a result of or happened in connection with a breach of contract, the rules of contractual liability apply. According to these stricter rules, the party in breach is relieved of liability only if he is able to prove that the damage occurred as a consequence of circumstances beyond his control, that such circumstances were unforeseeable at the time of the conclusion of the contract, and that it could not be expected from him to prevent such circumstances or the damage.⁶⁵ In effect, the contractual liability rules correspond to the similar rules of the CISG.⁶⁶

As far as the amount of damages is concerned, Hungarian law is based on the principle of full compensation. Accordingly, the aggrieved party must be restored to the position he would have been in if the infringement had not been committed.⁶⁷ Generally, damages may be claimed for the diminution in the value of assets (*damnum emergens*), for lost profits (*lucrum cessans*) as well as for expenses incurred as a result of the infringement.⁶⁸ Benefits gained as a result of the damaging event have to be deducted, unless this would be unjustified.⁶⁹ Unforeseeable losses do not have to be compensated.⁷⁰ In exceptional cases the court may award partial compensation (e.g. due to the defendant's poor financial situation, although such cases are extremely rare).⁷¹ Special rules apply for the calculation of damages in the case of contractual liability. The damage caused to the subject matter of the contract has to be compensated in full, whereas other consequential losses may only be compensated if the aggrieved party proves that these were foreseeable at the time of concluding the contract.⁷² In the case of an intentional breach of contract, full compensation is payable.⁷³

Compensation may be claimed for non-pecuniary damage suffered as a result of the trade secret infringement. The Civil Code fundamentally changed the previous legal regimes and 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). The main difference between the previously applicable sanction (called '*nem vagyoni kártérítés*', i.e. compensation for non-pecuniary damage)⁷⁴ and the new '*sérelemdíj*' is that, according to the new rules, it is not necessary for the injured party to prove that it suffered non-pecuniary damage (detriment).⁷⁵ Thus, theoretically even trivial infringements may trigger the payment of compensation for non-pecuniary damage. Since the Civil Code entered into force on March 15, 2014, there has been no court practice and thus it remains to be seen how the

⁶⁴ Sections 6:519 and 1:4(1) of the Civil Code.

⁶⁵ Section 6:142 of the Civil Code.

⁶⁶ United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG), Art. 79(1).

⁶⁷ Section 6:522(1) of the Civil Code, Á. Fuglinszky, *Kártérítési jog*, HVG Orac, 2015, pp. 44-47.

⁶⁸ Section 6:522(2) of the Civil Code.

⁶⁹ Section 6:522(3) of the Civil Code.

⁷⁰ Section 6:521 of the Civil Code.

⁷¹ Section 6:522(4) of the Civil Code.

⁷² Section 6:143(2) of the Civil Code.

⁷³ Section 6:143(3) of the Civil Code.

⁷⁴ Sections 355(1) and 355(4) of Act IV of 1959 on the Civil Code (not in force since 15 March 2014).

⁷⁵ Section 2:52(2) of the Civil Code, L. Székely, *Személyiségi jogok*. In: L. Vékás, P. Gárdos (eds), *Kommentár a Polgári Törvénykönyvhöz*, Wolters Kluwer, 2014, pp. 172-176.

courts will handle trivial cases.⁷⁶ In any event, when the court determines the amount of the compensation for non-pecuniary damage, it has to take into account the effects which the infringement had on the trade secret proprietor. Other relevant factors influencing the amount of the compensation include, in particular, the weight of the infringement, its repetition and the degree of the infringer's culpability.⁷⁷

2.5 Preserving trade secrets in the course of proceedings

In Hungary both administrative and civil procedural rules acknowledge the right of trade secret proprietors to keep certain information undisclosed and inaccessible. In this Section we only summarise the rules of the civil and administrative proceedings, which special emphasis on competition supervisory proceedings carried out by the HCO. With respect to administrative procedures the APA imposes the general obligation on Hungarian authorities to ensure that trade secrets are not disclosed to the public and cannot be obtained by unauthorized persons.⁷⁸ The Code of Civil Procedure does not contain any such general obligation; instead, it provides for the protection of trade secrets by way of specific rules.

In the course of Hungarian administrative proceedings and civil lawsuits, trade secret protection takes place basically on three levels. First, when granting authorisation to access the documents of the proceedings, information qualifying as trade secrets are generally not covered by the authorization and thus cannot be inspected. Second, procedural provisions on witness testimonies and oral hearings also take into account the importance of keeping trade secrets confidential. Third, certain rules on the drafting, disclosure and communication of decisions and orders also contribute to an effective protection of trade secrets during administrative and civil proceedings.

2.5.1 Restricted access to the documents of the proceeding

In Hungarian administrative proceedings the authorities are obliged by law to ensure the confidentiality of trade secrets when granting authorization to access the documents of the proceedings.⁷⁹ As a general rule, clients are allowed to access the documents of the proceedings at any time during administrative procedures.⁸⁰ However, documents containing trade secrets can only be accessed if the lack of knowledge of privileged information would impair the client in exercising his rights conferred by law.⁸¹

Clients may request the restriction of access to the relevant documents in order to preserve the confidentiality of their trade secrets by expressly specifying the data concerned and by referring to their business interests. The competent authority approves the request, upon carefully weighing the relevant circumstances of the case, if the lack of knowledge about the data concerned will not impair the persons being granted access to documents in exercising their rights conferred by law.⁸²

⁷⁶ See Á. Fuglinszky, *Kártérítési jog*, HVG Orac, 2015, pp. 838-843., L. Székely, *Személyiségi jogok*. In: L. Vékás, P. Gárdos (eds), *Kommentár a Polgári Törvénykönyvhöz*, Wolters Kluwer, 2014, p. 174.

⁷⁷ Section 2:52(3) of the Civil Code.

⁷⁸ Section 17(1) of the APA.

⁷⁹ Section 5(4) of the APA.

⁸⁰ Section 68(1) of the APA.

⁸¹ Section 69 (1)(d) of the APA.

⁸² Section 69(2) of the APA.

In Hungarian administrative procedures, before granting access to the documents of a proceeding, the authority renders the trade secrets, to which the authorization of the person inspecting documents does not pertain, unrecognizable.⁸³

The Competition Act also grants clients the authorization to inspect the documents of the relevant competition supervision proceedings.⁸⁴ Access to the documents of the proceedings conducted by the HCA *ex officio* may be permitted only following the conclusion of the investigation, as a main rule.⁸⁵ Up to that time, access to documents may be granted only if this is considered to be absolutely necessary for exercising the right of appeal against a ruling adopted in the course of the proceedings.⁸⁶

Access to certain documents may be restricted on the grounds of trade secret protection only if the person providing the document to the HCA, or the secret proprietor, requested in due time that the data should be treated as a trade secret.⁸⁷ When requesting certain data to be treated as trade secrets, the proprietor should specify the exact data concerned and include a detailed reasoning for each separate piece of data. The reasoning should contain in particular the interests that need to be protected and which would be harmed if they were disclosed to a person without entitlement.⁸⁸

During the dawn raids carried out by the HCA, it is not unusual for whole data media and storage devices to be either seized or copied by the investigators. With respect to the information stored on such data mediums, it is important to note that a so-called evidence brief is prepared by the investigators, which contains the data relevant for the facts of the case. All other information stored on the data medium is blocked and will not be included in the case files. Only the evidence brief will be part of the documents of the competition supervision proceeding. The evidence brief is sent to the client or the data proprietor in order that the client can a statement in connection with the trade secret classification of the relevant data stored on the seized data medium.⁸⁹

In the case of documents containing trade secrets, access to documents of proceedings conducted by the HCA is generally refused. However, even if that is the case, access will be granted if the lack of knowledge about the information contained in such documents would impair the client in exercising his rights conferred by law.⁹⁰ In such cases the competent competition council will permit the inspection of documents upon weighing the circumstances justifying the right of the client requesting access to the documents against the right of the data proprietor to keep the data confidential.⁹¹ In case access to such documents is granted, the information inspected in connection with the documents concerned may be used solely for the purposes of the given competition supervision proceeding and the related judicial review.⁹²

In order to prevent unauthorised persons from gaining access to the data in question, parallel to authorising the access to information qualifying as trade secrets, the competition council

⁸³ Section 69(3) of the APA.

⁸⁴ Section 55(1) of the Competition Act.

⁸⁵ Section 55(5) of the Competition Act.

⁸⁶ Section 55(5) of the Competition Act.

⁸⁷ Section 55/A(2) of the Competition Act.

⁸⁸ Section 55/A(4) of the Competition Act.

⁸⁹ Section 65/B(3) of the Competition Act.

⁹⁰ Section 55/A(1)(d) of the Competition Act.

⁹¹ Section 55/B(3) of the Competition Act.

⁹² Section 55/B(6) of the Competition Act.

may limit the right to make copies or abstracts of the documents. In exceptional cases the competition council may order that the right of access may be exercised only by the client's lawyer or by an expert retained by the client and that the data concerned may not be disclosed to anyone, including the client.⁹³

When approving a request aimed at treating certain data as trade secrets, the HCA obliges the person providing information or the data proprietor to prepare and make available a version of the documents concerned which do not contain any trade secrets.⁹⁴ In order to provide guidance in connection with the preparation of the versions of the documents concerned which do not contain trade secrets, the HCA has published a notice on its website on that issue.⁹⁵ If the investigator or the proceeding competition council detects that the proprietor of a certain trade secret may be other than the person providing it, the data proprietor will be requested to make a statement as to the classification of the potential trade secret.⁹⁶ As an important procedural guarantee, data proprietors have the right to appeal the rulings of the HCA, relating to the authorization of access to the documents and to the treatment of things as trade secrets, independently in the course of the proceeding.⁹⁷

In the course of civil lawsuits the parties, the public prosecutor and other affected persons can exercise their right to access documents and to make copies according to specific rules and conditions laid down by the judge of the case. In case the documents concerned contain trade secrets, the signing of a confidentiality agreement is required in advance. If, however, the proprietor of the trade secret made a statement in due time in which he refuses to allow access to the documents containing trade secrets, only the court and the transcriber are allowed to have access to the relevant part of the documents containing trade secrets.⁹⁸ Third parties can be granted access to documents of civil proceedings containing trade secrets only where the data proprietor has granted an exemption.⁹⁹

2.5.2 Restrictions relating to witness testimony and oral hearings

In the course of clarifying the facts in administrative procedures, a person who was not released from the obligation of confidentiality concerning trade secrets cannot be required to testify.¹⁰⁰ If a testimony is taken in violation of this rule, the testimony concerned may not be admissible.¹⁰¹ However, in competition supervision proceedings witnesses can also testify about information which qualifies as trade secrets.¹⁰² In such cases, the rules applicable to the authorisation of access to documents apply to the recording of the testimony, too.

According to the Code of Civil Procedure, giving a testimony may be refused by persons bound to keep trade secrets in connection with the subjects relating to the obligation to keep the relevant information confidential. However, giving a testimony cannot be refused if the person bound to keep trade secrets was granted an exemption by the data proprietor, or if the

⁹³ Section 55/B(4) of the Competition Act.

⁹⁴ Section 55/A(5) of the Competition Act.

⁹⁵ Tájékoztató az üzleti titokra, illetve magántitokra vonatkozó nyilatkozatokról és a titokmentes iratok benyújtásáról

http://www.gvh.hu//data/cms1027494/szakmai_felhasznaloknak_ut_tajekoztato_2014_08_26.pdf Accessed 11 May 2015.

⁹⁶ Section 55/A(3) of the Competition Act.

⁹⁷ Section 55/B(7) of the Competition Act.

⁹⁸ Section 119(2) of the Code of Civil Procedure.

⁹⁹ Section 119(3) of the Code of Civil Procedure.

¹⁰⁰ Section 53(5) of the APA.

¹⁰¹ Section 53(3)b) of the APA.

¹⁰² Section 64/B(5) of the Competition Act.

subject matter is not treated as a trade secret pursuant to specific law provisions. Giving a testimony may not be refused on the basis of trade secret protection, if the subject matter of the action lies in the decision about whether or not a data qualifies as information of public interest.¹⁰³

In the case of hearings in the course of administrative procedures, the authority may decide to hold the hearing in closed sessions in order to ensure the protection of trade secrets.¹⁰⁴ Moreover, the examination of the witness cannot be attended by the client or any other parties to the proceeding if the witness testimony concerns trade secrets.¹⁰⁵

Similarly, civil courts hold public hearings as a general rule, though certain sections or the whole hearing can be closed to the public if it is deemed to be necessary in order to protect trade secrets.¹⁰⁶

2.5.3 Restricted content of final decisions and resolutions

The provisions of the APA guarantee the confidentiality of trade secrets during, respectively, the drafting and communication of final decisions and resolutions in the course of administrative proceedings. Where publicity of a decision is not restricted or excluded by law, upon the conclusion of the proceedings the final resolution is disclosed to the general public after rendering trade secrets unrecognizable.¹⁰⁷ However, a decision may contain trade secrets of the type that can be made available to the person to whom the decision is communicated.¹⁰⁸

In a case where a person requesting access to a decision is able to substantiate that access to trade secrets enclosed in the decision is necessary for the enforcement of his right, or for the fulfilment of his obligation conferred upon him by the relevant legislation or an official ruling, the trade secrets concerned cannot be rendered unrecognizable.¹⁰⁹

Decisions passed in the course of competition supervision proceedings should be constructed in a way as not to contain trade secrets which cannot be accessed by the addressee of the decision or the person who has the right to access documents.¹¹⁰ After the final conclusion of proceedings conducted by the HCA, all trade secrets processed in the course of the proceedings are blocked. In the case files it is clearly indicated which information qualifies as trade secrets and documents containing trade secrets are kept separately from other data.¹¹¹

In the case of civil lawsuits, copies of resolutions passed in the course of civil proceedings that contain trade secrets, or in an action that was held fully or partly in closed sessions which excluded the public, cannot be made.¹¹² Trade secrets are also protected when publishing the judgement. As a general rule, the Supreme Court and the Courts of Appeal have to publish their judgements, as well as the lower instance decisions in the same case, in digital format on the internet. However, the names of the parties have to be substituted with their procedural

¹⁰³ Section 170 of the Code of Civil Procedure.

¹⁰⁴ Section 62(4) of the APA.

¹⁰⁵ Section 54(4) of the APA.

¹⁰⁶ Section 5(1)-(2) of the Code of Civil Procedure.

¹⁰⁷ Section 69/A(1)-(2) of the APA.

¹⁰⁸ Section 73(1) of the APA.

¹⁰⁹ Section 69/A (4) of the APA.

¹¹⁰ Section 55/C(2) of the Competition Act.

¹¹¹ Section 55/C(3) of the Competition Act.

¹¹² Section 119(9) of the Code of Civil Procedure.

position (*e.g.* plaintiff).¹¹³ If the public was excluded from the whole or part of the hearing, and the protection of the interest underlying the exclusion (*e.g.* protection of trade secrets) cannot be guaranteed otherwise, the respective part of the judgement has to be omitted from the published version.¹¹⁴ Therefore, if the Court held a closed hearing in order to protect trade secrets, those parts of the judgement which contain these trade secrets cannot be published on the internet.

3. Protection of know-how in confidentiality or non-disclosure agreements

The rules on contract law of the Hungarian Civil Code are dispositive. This means that the parties can freely determine the contents of their contract provided that it is not contrary to any legal rules.¹¹⁵ Consequently, the parties can impose an obligation about treating certain information as confidential and can prohibit disclosing such information to any third party, even if such information would not qualify as a business secret under the Civil Code. For example, if a company engages a subcontractor to perform research activities and product development under an R&D agreement, and even if the result does not constitute intellectual property or a trade secret, the contract can prohibit the subcontractor from disclosing the results.

Nevertheless, in the case of disclosure, the proprietor of the 'trade secret' (which does not enjoy statutory protection) can enforce claims against its contractual partner only, based on breach of contract, but no claim can be enforced against a third party based on acquiring the 'trade secret' unlawfully.

In case of a breach of the confidentiality or non-disclosure agreement, the general rules of civil law apply. Basically, the aggrieved party may request the court to order the other party to perform its contractual obligation.¹¹⁶ If the breach of contract resulted in damages and the party in breach cannot exculpate itself, the aggrieved party may claim compensation for these damages.¹¹⁷ The burden of proof lies on the aggrieved party in relation to the breach of contract and the other preconditions of its damages claim. Furthermore, the agreement may contain specific sanctions for the breach of the confidentiality obligation (*e.g.* penalty clauses¹¹⁸). In our view, such sanctions will not be considered as illegal even if the information (know-how) does not meet the strict statutory standards.

4. Misuse of trade secret protection

4.1 Critique regarding the scope of protection

The present provisions of the Civil Code on the protection of trade secrets entered into force on 15 March 2014.¹¹⁹ According to the transitional provisions, unlawful acts against trade secret protection committed before the entering into force of the presently in force provisions shall be treated under the respective previous law in force at the time of the acts committed.¹²⁰ Therefore, there is hardly any case law available under the new provisions

¹¹³ Sections 163 and 166 of Act CLXI of 2011 on the Organization and Administration of the Courts.

¹¹⁴ Section 166(3) of Act CLXI of 2011 on the Organization and Administration of the Courts.

¹¹⁵ Section 6:1(3) of the Civil Code.

¹¹⁶ Section 6:138 of the Civil Code.

¹¹⁷ Sections 6:142 and 6:143 of the Civil Code.

¹¹⁸ Section 6:186 of the Civil Code.

¹¹⁹ Section 8:4 of the Civil Code.

¹²⁰ Section 8(1) of Act CLXXVII of 2013 on the transitional and empowering provisions relating to the entry into force of Act V of 2013 on the Civil Code.

which might have inspired a critique in the relevant legal literature. For the sake of completeness we mention that, before the entry into force of the Civil Code, there was an academic debate in Hungary about whether know-how should enjoy protection as an exclusive right or merely as a trade secret.¹²¹ The final text of the Civil Code chose the latter solution (protection as a trade secret, see Section 1.1.5 above).

The conflict between the trade secret protection and freedom of information legislation is often subject to critiquing by local NGOs as well as by investigative journalists in Hungary. Hungarian freedom of information laws provide a right for anyone to access recorded information held by public sector organizations, including information of public interest and data public in the common interest. The protection of trade secrets does not apply to data relating to the central budget, the budget of local governments, the appropriation of European Union financial assistance, any subsidies and allowances in which the budget is involved, the management, control, use and appropriation and encumbrance of central and local government assets, the acquisition of any rights in connection with such assets, or to any other data specified by legislation as information which should be made public in the common interest. However, the publication of such data may not result in the disclosure of protected information, including trade secrets that, if made public, would be disproportionately detrimental to the business operations to which it is related, even though withholding such information should not interfere with the availability of, or access to, information of public interest.¹²² The freedom of information disclosure requirements also apply to natural and legal persons (private entities) entering into a financial or business relationship with the central or local governments budget, which involves the publication of the data (such as financial data) relating to such relationship.¹²³

According to the local practice, the data controller has the burden of proof to demonstrate that the data is covered by trade secret protection,¹²⁴ that its publication would be disproportionately detrimental to business operations¹²⁵ and that the withheld information does not interfere with the access to information of public interest.¹²⁶ If a private entity having a financial relationship with the central or local budget refuses to comply with a request for information based on the protection of trade secrets, the requesting party may initiate the proceedings of the authority delegated to exercise judicial oversight over the private entity.¹²⁷ This provision is criticized by local NGOs as not being an effective legal remedy, as it is unclear if court action may be initiated against the data controller or if the judicial oversight is a prerequisite for filing a court action.¹²⁸

¹²¹ In favour of a protection with an exclusive right: Gy. Boytha, Reflexiók dr. Bobrovsky Jenő "Rejtélyek és fortélyok" című tanulmányához, Polgári Jogi Kodifikáció, 2006(5) pp. 16-27., against such protection J. Bobrovsky, Rejtélyek és fortélyok: hozzászólás az üzleti titok és a know-how kérdésköréhez a Ptk. Javaslat kapcsán, Polgári Jogi Kodifikáció, 2006(4) pp. 22-38. For the summary of the main arguments: G. Faludi, Megjegyzések az új Ptk. tervezet know-how-ra vonatkozó szabályaihoz, Polgári Jogi Kodifikáció, 2006(5) pp. 27-32.

¹²² Section 27(3) of the Data Protection Act.

¹²³ Section 27(3a) of the Data Protection Act.

¹²⁴ Case no. Metropolitan Appeal Court 2.Pf.20.708/2008/7.

¹²⁵ Case no. Metropolitan Appeal Court 2.Pf.20.559/2011/3.

¹²⁶ Case no. Metropolitan Appeal Court 2.Pf.22.192/2012/3., Metropolitan Appeal Court 2.Pf.22.156/2011/5.

¹²⁷ Section 27(3b) of the Data Protection Act.

¹²⁸ M. Ligeti, B. Romhányi, A. Szloboda, Mit választunk? Az intézményrendszer és a költségvetés átláthatósága Magyarországon, Transparency International, 2014, p. 63.

http://transparency.hu/uploads/docs/MitValasztunk_Az_intezmenyrendszer_es_a_koltsegvetes_atlathatosaga_Magyarorszagon.pdf, Accessed 11 May 2015

See also <http://www.ugyvedvilag.hu/rovatok/szakma/az-uzleti-titok-vedelme-es-a-kozerdeku-adatok-nyilvanossaga> Accessed 24 March 2015.

4.2 Illegal misuse of trade secrets?

There are no express provisions in the Hungarian law on 'illegal misuse' of trade secrets, and we are not aware of any relevant case law. In fact, Hungarian law does not even use the term 'illegal misuse'. However, there are several legal provisions which may be invoked in case of a potential 'illegal misuse' of trade secrets.

According to the Civil Code, any abuse of rights is forbidden¹²⁹ and any exercising of rights shall be done in accordance with the requirements of good faith and fair dealing.¹³⁰ Furthermore, according to the general clause of the Competition Act, it is prohibited to engage in unfair economic activities, particularly in a manner which infringes or jeopardises legitimate interests of customers, users and competitors, or which is contrary to the requirements of business fairness.¹³¹ These provisions may also be applied to any illegal acts of a proprietor concerning his trade secrets.

We believe that the very nature of the trade secret, *i.e.* that it is some information in the exclusive possession of the lawful proprietor, makes it quite impossible for the proprietor to misuse his trade secret. However, theoretically two types of misuse might be envisaged.

4.2.1 Withholding trade secrets as a potential misuse

The first type is a situation where the misuse lies in the withholding of a trade secret. Of course, such a misuse can occur only when there is an obligation for the proprietor to disclose his trade secret. Generally, there is no such obligation due to the mere existence of the trade secret. Even important technological information, *e.g.* a pioneer invention, can be kept secret by the inventor or the proprietor, respectively, if he has chosen this option (instead of applying for patent protection).

It seems that, with respect to the trade secret, some other activity or engagement on the part of the proprietor is necessary in order for a withholding to qualify as misuse.

If a trade secret relates to an employee's invention, it may be a duty of the inventor to disclose it without any delay to his employer.¹³² Failure to observe such an obligation constitutes a civil wrong. The employer may claim damages and, if the inventor has filed a patent application or obtained a patent, request that the patent application or patent be assigned to him.

If a trade secret relates to an invention not yet published and the proprietor is seeking patent protection, the invention should be disclosed in the patent application in a manner which is sufficiently clear and complete for it to be carried out by a person skilled in the art.¹³³ In the case where the applicant withholds some teaching that would be necessary for carrying out the invention, the application may be rejected or the patent, if granted, may be nullified.¹³⁴

¹²⁹ Section 1:5(1) of the Civil Code.

¹³⁰ Section 1:3(1) of the Civil Code.

¹³¹ Section 2 of the Competition Act.

¹³² Section 11(1) of Act XXXIII of 1995 on the Patent Protection of Inventions.

¹³³ Section 60(1) of Act XXXIII of 1995 on the Patent Protection of Inventions.

¹³⁴ Sections 42(1)(b) and 76(3) of Act XXXIII of 1995 on the Patent Protection of Inventions.

Withholding important information concerning marketed goods or services may constitute an unfair economic activity or may qualify as a deception of customers,¹³⁵ or as a misleading commercial practice.¹³⁶

Pursuant to transparency regulations in public law, national public authorities are obliged to disclose data of public interest. Such data may include business-related information. According to the Data Protection Act, such disclosure may not result in the access to secret data, in particular know-how, the knowledge of which would cause a disproportionate harm to the business activity, unless the withholding hinders the possibility for gaining knowledge of the data of public interest.¹³⁷ An untrue reference to such circumstances in order to avoid disclosure to the public may constitute an illegal misuse of trade secrets.

Finally, it is theoretically possible that the withholding of trade secrets could qualify as an abuse of a dominant position.¹³⁸ If the trade secret proprietor enjoys a dominant position on the relevant market, refusal to enter into an appropriate business relationship without objective reasons may qualify as an abuse.¹³⁹ It is possible that, based on this provision, under certain circumstances a dominant undertaking may be obliged to disclose its trade secret to its contractual partner.¹⁴⁰ However, we are not aware of any such case.

4.2.2 Abuse of exclusive rights as a potential misuse

A second type of misuse may be an abuse of the exclusive rights in the trade secret by the proprietor. An unfounded claim concerning unlawful acquisition, use or disclosure of a trade secret, or legal proceedings initiated for such a claim in bad faith, would constitute an abuse. However, such abuse is not specific to trade secret protection, it may occur in litigation concerning any (intellectual property) right. There are no specific provisions in the Hungarian law with respect to bad faith litigation based on intellectual property rights or trade secret protection. According to the Code of Civil Procedure, it is a duty of the court to prevent any acts and behaviour of the parties in civil procedures which are against the requirement of *bona fide* processing.¹⁴¹

In the case when the proprietor of the trade secret misuses his rights in a way which is against the requirements of good faith and honest conduct, or his litigation may be regarded as an abuse of rights, the other party or respondent, respectively, may claim that the court enjoins the proprietor of the trade secret from such behaviour and may claim damages.

¹³⁵ Sections 2 and 8(2) of the Competition Act.

¹³⁶ Section 7(1) of the Act No. XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices.

¹³⁷ Section 27(3) of the Data Protection Act.

¹³⁸ Section 21 of the Competition Act.

¹³⁹ Section 21(c) of the Competition Act, P. Miskolczi Bodnár, 21. §. In: M. Juhász, D. Ruzshtiné Juhász, A. Tóth, *Kommentár a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról szóló 1996. évi LVII. törvényhez*, HVG Orac, 2015, pp. 301-303.

¹⁴⁰ Pursuant to Section 76(1)(h) the HCO is entitled to order the dominant undertaking to conclude a contract.

¹⁴¹ Section 8(2) of the Code of Civil Procedure.