

# Trade Secrets in the New Civil Code of Hungary

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## I Introduction – Summary of the Changes

The new Hungarian Civil Code<sup>1</sup> does not devote too much room to the provisions that create a connection between civil law and the intellectual property codes.<sup>2</sup> Altogether, only one section deals directly with the connection between intellectual property (IP) and the NHCC.

However, the topic still deserves a presentation, since significant change has occurred in the theoretical approach to this connection. It may have an impact on jurisprudence and legal education. Paradoxically, practising lawyers will not be affected too much by the changes.<sup>3</sup> The provision in question reads as follows:

‘§ 2:55 NHCC [Subsidiary application]

This Act shall be applicable to subject-matters falling within the scope of this Act that are not covered by the acts on copyright and industrial property rights.’

In addition to this general rule connecting IP law and civil law,<sup>4</sup> a number of provisions have to be mentioned that have an effect on IP protection and, in particular, on IP contracts.

First, there is the subject-matter of this presentation, the modified rules on trade secret and know-how in § 2:47 NHCC, which determine know-how protection - correctly - as a subtype of the protection of a trade secret. This approach – which conforms with Article 39 (2) of the TRIPS Agreement<sup>5</sup> – replaces the traditional approach used by the former Hungarian Civil Code

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<sup>1</sup> 2013. évi V. törvény a Polgári Törvénykönyvről (Act V of 2013 the Civil Code, or NHCC).

<sup>2</sup> It is not worth citing all the copyright and industrial property codes. It is sufficient to say that Hungary provides, in special acts, for all protected subject-matters that are listed in the relevant global copyright and industrial property conventions and treaties.

<sup>3</sup> E. g. a miscellaneous intellectual creation that does not fall within the scope of the protection afforded by the copyright and industrial property codes ceases to be a protected subject-matter.

<sup>4</sup> See. Gabor Faludi, *Intellectual property in the new Civil Code of Hungary. Edited version of the presentation held at the seminar titled "The New Civil Codes in Hungary and Romania I"* on 24 May 2013, Cluj-Napoca (Kolozsvár, Klausenburg).

<sup>5</sup> Annex 1C titled ‘Trade-Related Aspects of Intellectual Property Rights’ attached to the ‘Agreement Establishing the World Trade Organization’, <[http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#wtoagreement](http://www.wto.org/english/docs_e/legal_e/legal_e.htm#wtoagreement)> accessed 25. October 2014 is the first international instrument to define and protect trade secrets including know-how against

(Act IV of 1959 on the Civil Code, hereinafter referred to as FHCC), which regarded know-how as a type of intellectual creation and provided for an exclusive right, without any exceptions and limitations, to prohibit all unlicensed exploitations of the know-how.

The rules of § 6:175 and § 6:176 of the NHCC, as general rules of breach of contract, provide for the title warranty and non-conformity liability that are also applicable with regard to the transfer (assignment) of economic IP rights, while § 6:178 provides for title warranty and contractual liability that are suitable to cover the remedies for defective performance of copyright, trademark, commercial name and other industrial property licensing agreements.

A provision in § 6:331 paragraph (2) of the NHCC on the definition of the lease agreement unfortunately expands the scope of rules of property leases to the temporary use of rights in consideration for a fee. The application of this rule to IP licensing agreements is dubious, since the subject-matter of the IP licensing agreements is never the use of the IP right holder's economic rights, but rather the usage/exploitation of the protected subject-matter (protected work in copyright licensing agreements, patented or patent-pending inventions in patent licensing agreements, registered or to-be registered signs in trademark licensing agreements, and trade names in trade name licensing agreements).

## **II Importance of Trade Secret Law - the Economic Rationale of the Protection**

### **1 The Draft Trade Secret Directive**

Proof of the importance of this topic at the moment is that the attention of the European legislator has been turned to the harmonisation of trade secret (undisclosed business information) protection, which will also include know-how. Since the Hungarian legislator just finished reconsidering the framework of the legal protection of know-how under the umbrella of trade secret protection in the NHCC, it is worth mentioning that a new instrument is in preparation and envisaging whether a review of the new Hungarian approach will be necessary.

The Trade Secret EU Directive on some aspects of the protection of trade secrets is looming. It will be put on the agenda of the EU Parliament, since the member states seem to have reached a consensus over the draft<sup>6</sup> and also the European Economic and Social Committee

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the unlawful (unlicensed) acquisition, disclosure, publication or exploitation if committed as an unfair commercial behaviour (hereafter: TRIPS Agreement). The TRIPS Agreement is promulgated in Hungary by *1998. évi IX. törvény az Általános Vám- és Kereskedelmi Egyezmény (GATT) keretében kialakított, a Kereskedelmi Világszervezetet létrehozó Marrakesh-i Egyezmény és mellékleteinek kihirdetéséről* [Act IX of 1998 on the promulgation of the Marrakesh Treaty and its Annexes formed in the framework of the General Treaty on Trade and Tariffs (GATT) to establish the World Trade Organization].

<sup>6</sup> See the press release. [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/intm/142780.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/intm/142780.pdf).

supported the instrument with some remarks.<sup>7</sup> The first opinions on the draft have been published.<sup>8</sup> The Trade Secret Draft Directive will not provide for a complete legal framework. It will focus on the civil law protection against unlawful acquisition, use and disclosure of and the preservation of trade secrets during court and administrative procedures.

Although this paper – due to time constraints – cannot cover the draft directive in its entirety, one element should nevertheless be highlighted. The instrument plans to introduce ‘internal’ exceptions to the protection. Such exceptions will include, for example, the acquisition and disclosure of trade secrets in the context of the exercise of the rights of workers’ representatives to information, the acquisition or disclosure of a trade secret in the context of statutory audits performed in accordance with Union or national law, and the legitimate exercise of the freedom of expression and information.<sup>9</sup> The preamble (10b) of the last available version of the Draft Trade Secret Directive<sup>10</sup> reads as follows:

Media often make public data or information considered to be a trade secret by another party but the publication of which could be of public interest. As a result, it is important that measures and remedies provided for should not restrict the exercise of the freedom of expression and information (which encompasses media freedom and pluralism as reflected in Article 11 of the Charter of Fundamental Rights of the European Union) whenever legitimate.

In our view, it is a serious mistake to include the free speech exception into the directive and may lead to the frustration of the exploitation of valuable know-how and, thereby, of investments. Offended former contractual partners and employees who have various disputes with the holder of the right to the know-how may wish ‘simply’ to criticise the technological solution embedded in the know-how in public and thereby influence the dispute resolution. This exception already exists at the appropriate constitutional level in the various national laws and in the consolidated version of the Treaty on European Union (Art 6), as referred to by the above-cited preamble. Instead of directing the evaluation of the conflicting fundamental rights against each other (right to property against the right to free speech) before various constitutional fora on a case by case basis, the exception simply excludes the exercise of a legal right and puts the

<sup>7</sup> Commission’s Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure’ (the Trade Secret Draft Directive).

COM (2013) 0813 final – procedure number: COD (2013) 0402, the last available version: 26 May 2014, (9870/14) Inter-institutional File: 2013/0402, details on the procedure <http://eur-lex.europa.eu/procedure/EN/1041456#documentView>, accessed 25, October 2014, details on the opinion of the European Economic and Social Council <http://eescopinions.eesc.europa.eu/eescopiniondocument.aspx?language=en&docnr=8066&year=2013> accessed 25, October 2014.

<sup>8</sup> See, for example. Stellungnahme des Max-Planck-Instituts für Innovation und Wettbewerb zum Vorschlag der Europäischen Kommission für eine Richtlinie über den Schutz vertraulichen Know-hows und vertraulicher Geschäftsinformationen (Geschäftsgeheimnisse) vor rechtswidrigem Erwerb sowie rechtswidriger Nutzung und Offenlegung vom 28.11.2013, COM (2013) 813 final. <[http://www.ip.mpg.de/files/pdf3/Stellungnahme-Geschaeftsgeheimnisse\\_2014-05-12\\_final\\_7.pdf](http://www.ip.mpg.de/files/pdf3/Stellungnahme-Geschaeftsgeheimnisse_2014-05-12_final_7.pdf)> accessed 25, October 2014.

<sup>9</sup> Art 4 para (2) item *a*) of the Trade Secret Draft Directive.

<sup>10</sup> Council of the European Union, Brussels 19, May, 2014, 9870/14, Interinstitutional file: 2013/0402 (COD), PI 67, CODEC 1295.

holder of the trade secret into a seriously prejudiced position. Furthermore, the weighing of the conflicting fundamental rights is ensured without any special references to them in the relevant special legislation, both on European and on national levels. The European framework of copyright law, for example, does not include special references to certain ‘external’ fundamental rights that can come into conflict with the legal rights afforded to the copyright owner. Still, the CJEU can pass decisions in all sensitive matters that involve the conflict of the various fundamental rights, and weigh the relevant rights against each other.<sup>11</sup>

We can envisage that, if the Draft Trade Secret Directive is adopted, the Hungarian law which rules for trade secret protection on an excellent abstract level – both in the substantive and procedural law – will need an amendment to go into the detailed exceptions. It will not do any good for the clarity and applicability of the provisions, nor will the seriously disturbing impact of the incorporation of constitutional fundamental rights into the special substantive law.

## 2 Trade Secret as an Object for Protection

The trade secret is an enigmatic object of legal protection. It is a type of extremely intangible asset, since the object of protection is not homogeneous. It may range from simple data, facts, or factual information included in business concepts, business cases or plans regarding undisclosed technology know-how that in addition may stand alone or be inseparably connected to a patented product or process. The protection is free from any formalities. It comes into existence as of the creation of the undisclosed information on condition that the information can be regarded as secret and it is kept confidential.

Even to find a textbook definition is not easy: trade secret is all information that pertains to economic (for profit or not for profit) activity that is kept (that one attempts to keep) secret. The economic value of the information can either be added to the definition or it can be claimed that this value stems from the confidentiality of the information that is already included in the definition via the obligation to maintain secrecy. Trade secrets go hand in hand with all types of business, no matter whether the business is the training people to sing, the organisation of a game, the concept for a mobile application or the manufacture of human medicine. One can say that there is no for-profit and on the whole no non-profit business without trade secrets.

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<sup>11</sup> See for example. Case C-479/04 *Laserdisken ApS v Kulturministeriet* [2005] OJ C 31, 05.02.2005., Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU*, [2006] OJ C 212., 2.9.2006., Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2010] OJ C 113, 1.5.2010. Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH* [2012] OJ C 303, 6.10.2012. The EUCJ interprets the applicable copyright directives in the light of the conflicting property right and right to a legal remedy of the right owners on the one hand with the right of free speech, the right to privacy and the right to conduct business on the other hand on the grounds of weighing the relevant fundamental rights without having such right incorporated into the applicable copyright directives.

### 3 The Economic Rationale of Protection in the Light of the Draft Trade Secret Directive

The EU Commission (being true to its name) commissioned a study on the economic rationale of trade secret protection.<sup>12</sup>

The protection of a trade secret is significant and justified from an economic perspective, states the study. Trade secret policy influences innovation and business performance in a number of aspects. Without such effective protection, undertakings are unable to ensure the returns from innovative activity, in particular from R&D agreements that frequently do not produce results that can be protected by the traditional registered forms of protection. The most important economic benefit of such protection is that it offers incentives to exploit new innovations that qualify as trade secrets in conjunction with the necessary measures taken to keep the information secret. Without protection, such information would be buried.

Legal protection may contribute to the reimbursement of costs incurred by firms to protect undisclosed information from unlawful disclosure and exploitation. The protection is beneficial in labour relations as well. Without the appropriate contractual arrangements to ensure that former employees keep trade secrets in consideration for a fair compensation, underwritten by appropriate contractual securities (e.g. penalties), the risks of disclosure and exploitation of trade secrets by third parties employing the former employee or by the former employee in their own undertaking would be higher. It is stated and supported by surveys that effective and harmonised trade secret protection may effectively fill the gap between copyright and patent protection, the two traditional pillars of intellectual property.<sup>13</sup>

The EU expects from the harmonisation that ‘the EU would qualify as a safe harbour for firms to develop, exchange and use innovative knowledge. This would result in a competitive advantage for the EU economic system at large in its global challenge with aggressively competing areas.’<sup>14</sup>

### III International Instruments – the Paris Convention

The legal protection of trade secrets is deeply rooted in the Paris Convention.<sup>15</sup> Under Article 10 bis: ‘Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition’. This general rule is supplemented in paragraph (3) with an exemplificative list of acts, such as

<sup>12</sup> Study on Trade Secrets and Confidential Business Information in the Internal Market Final Study April 2013. Prepared for the European Commission Contract number: MARKT/2011/128/D <[http://ec.europa.eu/internal\\_market/iprenforcement/docs/trade-secrets/130711\\_final-study\\_en.pdf](http://ec.europa.eu/internal_market/iprenforcement/docs/trade-secrets/130711_final-study_en.pdf)> accessed on 25 October 2014.

<sup>13</sup> Ibid 16.

<sup>14</sup> Ibid 15.

<sup>15</sup> *Paris Convention for the Protection of Industrial Property of March 20, 1883*, as revised at Brussels on December 14 1900, at Washington on June 2 1911, at The Hague on November 6 1925, at London on June 2 1934, at Lisbon on October 31 1958, and at Stockholm on July 1, 1967, and as amended on September 28 1979 (The Paris Convention). <[http://www.wipo.int/treaties/en/text.jsp?file\\_id=288514](http://www.wipo.int/treaties/en/text.jsp?file_id=288514)> accessed on 26 October 2014, promulgated by 1970. évi

‘(i) acts (...) to create confusion with the establishment, the goods, or the industrial or commercial activities of a competitor;

(ii) false allegations (...) to discredit the establishment, the goods, or the industrial or commercial activities of a competitor;

(iii) indications or allegations (...) to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.’

As one can see, the disclosure of trade secrets is not mentioned among the examples. However, the list is not only exemplificative but provides for a minimum only.<sup>16</sup> Since such unlawful disclosure, publication and exploitation of trade secrets may in the first place jeopardise the competitors’ business, it is obvious that the various national laws, while transposing the Paris Convention into their legal systems, included the protection of business (trade) secrets into their laws on unfair competition.<sup>17</sup> The example of Hungary can be mentioned.

## IV Protection of Trade Secrets in the Competition Acts of Hungary

The first act on unfair competition was Act 5 of 1923.<sup>18</sup> § 15 of this Act provided that the disclosure or unauthorised use of trade or company secrets is prohibited. Similar but more detailed provisions could be found in the subsequent unfair competition legislation, such as § 5 and 6 of Act IV of 1984<sup>19</sup> and § 5 and 6 of Act LXXXVI of 1990.<sup>20</sup> The provisions of the law in effect<sup>21</sup> will be described in detail below.

In 1923 Hungary had no written Civil Code. Furthermore, the 1923 Unfair Competition Act did not define what a trade secret is. The courts had to cope with this problem.<sup>22</sup> The act merely explained in brackets what a company secret is. Such a secret could relate to a process, or to

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18. *törvényerejű rendelet az ipari tulajdon oltalmára létesült uniós egyezmények 1967. július 14-én Stockholmban felülvizsgált, illetve létrehozott szövegének kihirdetéséről* (Law-decree 18 of 1970 on the promulgation of the text of conventions to protect industrial property as revised and enacted in Stockholm on 14 July 1967).

<sup>16</sup> Prof. G.H.C. Bodenhausen, *Guide to the Application of the Paris Convention for the protection of industrial property as revised at Stockholm in 1967*, reprint 2007, 145. <[http://www.wipo.int/edocs/pubdocs/en/intproperty/611/wipo\\_pub\\_611.pdf](http://www.wipo.int/edocs/pubdocs/en/intproperty/611/wipo_pub_611.pdf)> accessed on 26.10. 2014.

<sup>17</sup> There is no room in this presentation to deal with the issue of the various approaches to unfair competition law and the reason why a number of legal systems do not have special legislation on the behaviours that amount to unfair competition.

<sup>18</sup> *1923. évi V. törvénycikk a tisztességtelen versenyről* (Act 5 of 1923 on unfair competition).

<sup>19</sup> *1984. évi IV. törvény a tisztességtelen gazdasági tevékenység tilalmáról* (Act IV of 1984 on the prohibition of the unfair conduct of business).

<sup>20</sup> *1990. évi LXXXVI. törvény a tisztességtelen piaci magatartás tilalmáról* (Act LXXXVI of 1990 on the prohibition of the unfair conduct of business).

<sup>21</sup> § 4 of *1996. évi LVII. törvény a tisztességtelen piaci magatartás és versenykorlátozás tilalmáról* (Act LVII of 1996 on the prohibition of the unfair conduct of business and the limitation of competition) (hereafter the Competition Act).

<sup>22</sup> See for example. Meszlény Artúr (ed), *A tisztességtelen versenyről szóló törvény (1923. évi v. törvénycikk) magyarázata* (Athenaeum irodalmi és nyomdai részvénytársulat 1923, Budapest), György Ernő, *A gazdasági verseny jogi kérdései* (Közgazdasági és Jogi Könyvkiadó 1976, Budapest).

manufacturing. We can say that the factual information was regarded as a trade secret and the technological information was a company secret. Furthermore, the act gave examples of dishonest acts that were prohibited between competitors, beyond the general prohibition of disclosure and exploitation of protected objects.

The subsequent statutes on the prohibition of unfair competition included a definition of a trade secret, which showed a considerable improvement as time went on. First, from 1984 until 1990, a trade secret was merely ‘any solution or data that pertained to any business, if the holder of that information had an equitable interest to keep them confidential’<sup>23</sup> Under Act LXXXVI of 1990, the definition was broadened. The object of a trade secret was supplemented with facts, and information.<sup>24</sup> The same definition was used by the 1996 Unfair Competition Act with a further supplement.<sup>25</sup> This advanced term already also included the obligation of the holder of the confidential information to take the necessary measures to keep it confidential. This broad definition embraced all the necessary elements: the “trade secret shall be any fact, information, solution or data that pertains to any business, if the holder of that information has an equitable interest to and takes the necessary steps to keep them confidential.”<sup>26</sup> This term remained part of the competition law until 2003, when the legislator relocated the definition into the FHCC, which was replaced by the NHCC as of March 15 2014.

The relocation of the definition into the FHCC had nothing to do with the TRIPS Agreement that will be dealt with in the next chapter. It was not justified<sup>27</sup> with any economic or theoretical reasoning. It referred to the transparency of the use of public funds, the amendment of the relevant act on the protection of personal data and the publicity of public data and also introduced an exception to the legal protection of trade secret with regards to information pertaining to the use of any public funds that had to be published. The exception did not cover technology know-how.<sup>28</sup> In conjunction with the relocation, the term was refined, but we omit the analysis of this version. It is not worth discussing here, since this paper will go into the details of the definition used by the NHCC in a separate chapter.

The relocation of the term involved an unobvious, hidden change in the approach to the protection of a trade secret. The legislator found a new place for the term, namely immediately after the provision on the protection of private confidential information and private correspondence, in the Chapter on the protection of personality rights. The objects of privacy protection were supplemented with a reference to the trade secret: ‘that person who infringes upon the privacy of correspondence; furthermore, that person who comes into the possession of private or trade secrets, and unlawfully makes them public or abuses them in any other way,

<sup>23</sup> § 5 para (2) of *1984. évi IV. törvény a tisztességtelen gazdasági tevékenység tilalmáról* (Act IV of 1984 on the prohibition of the unfair conduction of business).

<sup>24</sup> § 5 para (3) of *1990. évi LXXXVI. törvény a tisztességtelen piaci magatartás tilalmáról* (Act LXXXVI of 1990 on the prohibition of the unfair conduction of business).

<sup>25</sup> S 4 para (3) item *a*) of the Competition Act.

<sup>26</sup> *Ibid.*

<sup>27</sup> Justification (Explanatory memorandum) to Act XXIV of 2003, the reasoning of §. 16 *Complex electronic legal database, subdatabase: explanatory memoranda to acts* accessed on DVD on 27. October 2014.

<sup>28</sup> § 81 para (3) and (4) of the FHCC.

shall be deemed to infringe personality rights.<sup>29</sup> By this supplement, the approach to trade secret protection has broadened. It has gone beyond the boundaries of competition law. A trade secret has become an object of personality rights. At first sight this solution may seem strange, but it is true that a number of trade secret infringements have no connection to competition.<sup>30</sup>

While the term of the trade secret has been moved from competition law into civil law, the legal protection under competition law has remained as it was – with an important change in the system of sanctions.

The protection under the competition rules can be invoked against any unfair acquisition, disclosure or making public or use of the trade secret. The Competition Act offers an exemplificative list of behaviours that qualify as unfair acquisitions. This is unlicensed/unlawful acquisition by breach of confidence (employee, member or stakeholder) or breach of contract/business partnership. The system of sanctions under the Competition Act offers the entire menu of sanctions as introduced by the implementation of the IP Enforcement Directive.<sup>31</sup> Hungary specifically opted for the extended transposition of the directive.

It is worth highlighting the *sui generis* unjust enrichment claim that serves for the recovery of profit or, in the event of a loss, a license analogy claim and the claim to provide information on the chain of commerce about the ‘infringing’ product/service. Such a claim serves as a logical precondition for an unjust enrichment or compensation for damages claim.<sup>32</sup>

The last mentioned claim – namely the provision of information on the business connections regarding the infringement – is missing from the NHCC. Therefore, if the trade secret infringement is committed among competitors or at least among market players, it is advisable to rely on a lawsuit based on the Competition Act.

## V The Protection of Know-how under the FHCC

Before the TRIPS Agreement introduced the general term of undisclosed information (see the next chapter), it was not so obvious how know-how should be protected. In Hungary, know-how was regarded from 1978 as a category of intellectual creation. The FHCC devoted a subchapter to the protection of intellectual creations within the chapter on the protection of personality rights.<sup>33</sup>

The law afforded protection against all unlicensed exploitations. The sanctions of infringement embraced a claim to profit sharing, and, on a subsidiary basis, were applicable to the violation

<sup>29</sup> § 81 para (1) of the FHCC.

<sup>30</sup> If a former, dismissed employee wishes to take revenge for their dismissal and discloses a trade secret of his/her former employer to the press, or makes it public on the internet without any intent to sell it to anybody or to use it in business, such an act is not committed by a competitor or with the purpose of gaining a competition advantage. It may have an impact on the position of the former employer in the competition, but the act is closer to a pure infringement of personality rights rather than to an act of unfair competition.

<sup>31</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. [2004] OJ L157/45.

<sup>32</sup> S 86 para (2) items *e*) and *g*), para (3) item *a*) of the Competition Act.

<sup>33</sup> S 86, 87 of the FHCC.

of personality rights in the event of infringement (e.g. injunction). The jurisprudence showed interest in particular in the preparatory phase of the NHCC.<sup>34</sup>

## VI International Instruments – the TRIPS Agreement

The TRIPS Agreement – although its subject matter is intellectual property and it thereby reinforces the Paris Convention – uses the umbrella of the establishment of the WTO to supplement it. This is clear from Article 39 (1), which reads: ‘In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967)’. It invents the term ‘undisclosed information’, which can embrace any type of information from pure facts to technological know-how. Undisclosed information is secret. This secrecy is not an absolute notion, but rather a relative one: the information is secret, ‘if it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question.’<sup>35</sup> In other words: the circle of persons should be that of professionals who work with the type of information that is subject to protection. The commercial value of the information is the consequence of the secrecy. A piece of information which is in the public domain or readily accessible to professionals has no commercial value. It is cheaper to get access to such information than it is to pay a license fee for its exploitation or to pay a purchase price for its assignment. Due to the relative secrecy, it is expected from the person who has control over the information to take reasonable steps under the circumstances to keep it secret. This element is part of the adjective ‘undisclosed’.

The protection of such information can be claimed by both legal and natural persons. Such protection is a limited exclusive (preventive) right that protects the holder of the information against unlicensed disclosure, acquisition or use of the information by any third parties in conditions where such acts are committed in way that is contrary to honest (fair) commercial practices. Furthermore, a footnote<sup>36</sup> offers examples, such as breach of contract, breach of confidence and inducement to breach, and the acquisition by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.<sup>37</sup> To date

<sup>34</sup> See, for example, Bacher Vilmos, ‘A szellemi tulajdon jogi védelme és a Ptk’ (2000) 3 Polgári Jogi Kodifikáció 23–32., Bobrovsky Jenő, ‘Rejtélyek és fortélyok’ (2006) 4 Polgári Jogi Kodifikáció 22–38., Boytha György, ‘A szellemi alkotások joga és az új Ptk.’ (2000) 2 Polgári Jogi Kodifikáció 46–56., (2000) 3 Polgári Jogi Kodifikáció 13–23., Ficsor Mihály Zoltán, ‘A szellemi tulajdon és a Ptk’ (2001) 2 Polgári Jogi Kodifikáció 27–30., Faludi Gábor, ‘Megjegyzések az új Ptk. tervezet know-how-ra vonatkozó szabályaihoz.’ (2006) 5 Polgári Jogi Kodifikáció 27–32., Görög Márta, *A know-how jogi védelmének alapvető kérdései* (HVG-ORAC Budapest, 2012).

<sup>35</sup> Article 39 para (2) (a) of the TRIPS Agreement.

<sup>36</sup> N 10 to Article 39 para (2) of the TRIPS Agreement.

<sup>37</sup> See Article 39 paras (1) and (2) of the TRIPS Agreement, as well as ‘Implications of the TRIPS Agreement on Treaties administered by WIPO, WIPO PUBLICATION No 464’ [http://www.wipo.int/export/sites/www/freepublication/en/intproperty/464/wipo\\_pub\\_464.pdf](http://www.wipo.int/export/sites/www/freepublication/en/intproperty/464/wipo_pub_464.pdf); furthermore [http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/trips\\_03\\_e.htm#article39](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/trips_03_e.htm#article39) both websites accessed 27 October 2014.

there is no available jurisprudence or decision of a competent WTO body on the protection of undisclosed information.

Under Article 1 paragraph (1) of the TRIPS Agreement, Member States are free to select the method of implementation<sup>38</sup> and may – but shall not be obliged to – implement more extensive protection. Due to the national treatment, however, such higher level protection will be afforded to all legal subjects of other WTO member states.<sup>39</sup>

This authorisation opens the room for various approaches to trade secret protection.

Under the TRIPS Agreement, the term ‘undisclosed information’ comprises trade secrets and know-how, but other systemisations are also in harmony with the international instrument.

## **VII The Hungarian Implementation**

### **–Trade Secret and Know-how in Civil Law**

The basis for the Hungarian implementation is that the fundamental protection is to be accorded in the NHCC. Trade secrets can be regarded as a subcategory of private secrets, i.e. the most general protection may further be afforded within the legal framework of the protection of personality rights in the NHCC. Know-how – called protected knowledge in the NHCC – can be construed as a subcategory of trade secrets. As a result, the Hungarian legislation does not use the term ‘undisclosed information’ and does not subsume trade secrets and know-how under this definition. Instead, it follows the logic of the protection of personality rights from the general protection of all personality rights, no matter whether they are listed in the NHCC or not, via the most frequent named personality rights, such as the right to privacy (private secret) to the protection of the trade secrets and, within the category of trade secrets, as far as to the protection of know-how (protected knowledge).

The general legal framework of protection does not exclude the protection of trade secrets under the Competition Act. Moreover, it is clear that protection in relation to market players is afforded by the Competition Act.

The Patent Act<sup>40</sup> also contains relevant provisions. The employer as patent holder is obliged to pay compensation to inventors of service inventions, even in the event of the exploitation of the patentable service invention as technology know-how. The employer is free to handle the invention as a trade secret, and not to file a patent application or to withdraw such an application, but may not avoid the payment of compensation in the event of exploitation.<sup>41</sup>

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<sup>38</sup> ‘Members, therefore, are free to determine how best to meet their obligations under the TRIPS Agreement within the context of their own legal systems.’ Para 57 of the Appellate Body decision passed in the India – Patents (US) case, cited at Interpretation and Application of Article 1 item 7. [http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/trips\\_03\\_e.htm#article39](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/trips_03_e.htm#article39) accessed 27 October 2014.

<sup>39</sup> Article 1 par (3) of the TRIPS Agreement.

<sup>40</sup> 1995. évi XXXIII. törvény a találmányok szabadalmi oltalmáról [(Act XXXIII of 1995 on the patent protection of inventions (The Patent Act)].

<sup>41</sup> S 13 para (1) item c) of the Patent Act.

In addition, industrial property contract law refers also to know-how. Patent licensing agreements do not automatically include a licence to use any know-how pertaining to the invention. In other words, only a separate, express licence may authorise the patent licensee to use any know-how pertaining to the patent if held by the patent holder.<sup>42</sup>

Finally, a short reference should be made to the block exemption granted to technology transfer agreements, which covers know-how licensing agreements as well.<sup>43</sup>

The Hungarian law also provides for the relationship between public data and trade secrets, in the way that trade secret protection may not be invoked if government or EU budgetary sources are used and the audit (the control over the use of sources) or the transparency of such uses require the disclosure of the data.<sup>44</sup> The provision allows for an exception for know-how, but the exception cannot be used if the public data may not be made known without the disclosure of the know-how. In certain cases, this unclear solution may lead to the total devaluation of know-how.

## VIII Comparisons – Conclusion

In the NHCC, the Hungarian legislator adapted the legal protection of trade secret and that of know-how to the TRIPS Agreement. It is useful to compare the civil law protection of a trade secret and know-how from more aspects to learn how the adaptation succeeded. Below comes a general comparison between the solutions of the FHCC and the NHCC. A list of the identical and the different features of the legal protection of the factual trade secrets and of know-how then follows, bearing in mind that the latter constitutes a subcategory of the former.

In our view, the adaptation can be called a success. The freedom of implementation renders it possible to constitute a legal protection in the NHCC by not using the term undisclosed information and by subsuming know-how under the term of trade secret within the chapter on personality rights.

This solution meets the TRIPS requirements since the infringement of personality rights can be sanctioned beyond the ordinary cease and resist sanctions with the recovery of unjust enrichment, compensation of damages and, last but not least, *solatium doloris*.<sup>45</sup>

The previous protection went too far. Know-how enjoyed an unlimited exclusive (preventive) protection that was afforded to all nationals of all WTO member states, while the Hungarian right holders could not enjoy reciprocal protection. This absolute right therefore had to be narrowed to remedies against unfair/dishonest acts. Unfairness, in terms of the TRIPS agreement,

<sup>42</sup> S 28 para (5) of the Patent Act.

<sup>43</sup> 86/1999. (VI. 11.) Korm. rendelet a technológia-átadási megállapodások egyes csoportjainak a versenykorlátozás tilalma alól történő mentesítéséről (Government Regulation 86/1999 on the exemption of certain groups of technology transfer agreements from the prohibition to restrict competition).

<sup>44</sup> S 27 para (3) of the 2011. évi CXII. törvény az információs önrendelkezési jogról és az információszabadságról (Act CXII of 2011 on the right to autonomy of and the freedom of information).

<sup>45</sup> S 2:51. para (1) item *e*) (unjust enrichment), s 2:52. (*solatium doloris*), s 2:53. (compensation of damages) NHCC.

is however not a principle set out in the NHCC. Unfairness therefore had to be ‘translated’ into *Treu und Glauben* (bona fide and fair behaviour), which is a leading principle of the NHCC.

Chart 1

1. General comparison between the legal solutions of the FHCC and those of the NHCC	
FHCC	NHCC
A trade secret is a subcategory of private secrets – the protection of personality rights applies.	A trade secret is a subcategory of private secrets – the protection of personality rights applies. The term of the trade secret is adapted to the TRIPS Agreement.
Know-how is a subcategory of intellectual creations. The protection is provided for in a special subchapter of the chapter on the protection of personality rights	Know-how, now called protected knowledge, is a subcategory of trade secret.
Know-how protection is afforded against all unlicensed exploitations	Know-how is protected against unfair acts only; ‘unfair’ is an act that violates the principle of the NHCC of bona fide and fair behaviour.
In the event of know-how infringement, there is a special claim to profit sharing and subsidiary application of the sanctions for the violation of personality rights	Both trade secrets and know-how are protected by the system of sanctions of personality rights, which also includes an unjust enrichment claim.
2. Identical elements of the definition of factual trade secrets and of know-how (protected knowledge) in the NHCC	
Factual trade secrets	Know-how (protected knowledge)
Substantial information or a set of information pertaining to the economic activity of a person that is not public or not readily accessible for ‘professionals’ which is kept secret under the general principle of attributable (reasonable) behaviour	Technological, economic or organisational knowledge or a set of knowledge, if it meets the requirements of trade secret
3. Different elements in the protection of factual secrets and protected knowledge	
Factual trade secret	Protected knowledge
Protection against all unlicensed acquisition, disclosure, making public or use (exploitation)	Protection against unlicensed acquisition, disclosure, making public or use (exploitation), if the act is committed in violation of the <i>Treu und Glauben</i> principle (≈dishonest/unfair commercial practice in the TRIPS Agreement)
Exception: bona fide acquisition by third parties for consideration	Exceptions: – Independent development of know-how – Reverse engineering of the product or service incorporating the know-how Bona fide acquisition by third parties for consideration.

The protection of know-how had to be weakened by the exceptions that followed from the approach of the TRIPS Agreement (independent elaboration, reverse engineering, bona fide acquisition for consideration).

The protection of factual trade secrets should have been at first sight weakened by the same exceptions. However, the reverse engineering and independent elaboration – in view of the

Hungarian legislator – may not in practice occur with regards to simple facts that are kept confidential. As such, the only exception that weakens the legal protection of factual trade secrets is the bona fide acquisition for consideration. At this point, the Hungarian legal protection exceeds the level of protection of the TRIPS agreement. This is not a violation. The practice will show whether this element of protection will need correction or not. In a few years from now, when the EU Trade Secret Directive will be implemented – on condition that the draft will be adopted – the legislator will again have to deal with the protection of trade secrets.