

Bird & Bird & Trade Secrets

Protecting and enforcing Trade Secrets in Hungary – a practitioner's experience under the new rules

This is the 14th in a series of articles written by members of our International Trade Secrets Group, highlighting points of note regarding the protection of Trade Secrets in various jurisdictions.

In this article, we will look at the position in Hungary, where more than two years have passed since the EU Trade Secrets Directive was implemented into Hungarian law via a new piece of legislation. While trade secrets and know-how enjoyed legal protection before this, the general expectation was that the new approach would see a rise in litigation matters. While it is perhaps a little early to conclude whether or not such expectations were accurate, it is still worthwhile to take a snapshot look at the practical implications of the new provisions.

Old rules versus new rules

Before 2018 the basis of protection of trade secrets (and know-how) was the Hungarian Civil Code. The key provisions were included in the section on personality rights, which triggered certain practical problems when it came to enforcement. Besides the Civil Code, the Competition Act, the Labour Code, the Criminal Code and the Public Procurement Act also contained provisions relating to trade secrets, resulting in a somewhat fragmented situation.

Shortly after the expiry of the 9 June 2018 deadline for implementation of the EU Trade Secrets Directive into Hungarian law, the Hungarian parliament adopted *Act 54 of 2018 on Trade Secrets*, which came into force on 8 August 2018. In a nutshell, the new Trade Secrets Act contains more flexible provisions making its enforcement easier for businesses. The key improvements are the following:

- A trade secret is no longer a right relating to personality as trade secrets now enjoy special protection granted by the new Trade Secrets Act, which contains all relevant provisions.
- The sanctions and available enforcement tools are similar to IP rights.
- The new Trade Secrets Act contains general provisions on trade secrets, including definitions of trade secrets and know-how.

- Rights in relation to trade secrets and know-how are transferable.
- Regional Courts have jurisdiction in proceedings relating to trade secrets.

New provisions – new opportunities

Legal practitioners, especially IP litigators, have been advocating for the new Trade Secrets Act since 2018, emphasising that it offers new opportunities for businesses when it comes to violation of trade secrets or know-how. Contrary to the Directive, the Trade Secrets Act contains a definition of know-how which corresponds to the old definition provided in the Civil Code. By definition, know-how (or 'protected knowledge' as also referred to in the Act) is a subcategory of trade secrets, and covers technical, economic or organisational knowledge, solutions, experience or a combination of such, which information is recorded in an identifiable manner.

The new definition of trade secrets (and thereby know-how) stresses that trade secret protection only applies if the owner has taken "*reasonable steps under the circumstances to keep it secret*". This is a more straightforward approach compared to provisions applicable before 2018, under which the definition of trade secrets was indirectly linked to infringement, i.e., that information was subject to trade secret protection if unauthorised acquisition of the relevant information was not imputable to the owner. This concept was problematic because the key element of the definition was linked to an activity of a third party which is beyond the control of the owner.

The first use cases – rogue employees

Going after former employees who have refused to return information is certainly one of the obvious use cases. As in every litigation matter, the first phase is fact gathering, including collection of evidence. This includes, on the one hand, understanding the technical and organisational measures which were in place to keep information confidential, and, on the other hand, listing and classifying the information held by the former employee. This exercise is crucial as the court will rely on evidence gathered at this stage. As far as technical and organisational measures are considered, policies on applicable use of IT, on putting in place confidentiality

agreements or any similar internal policies or instructions can be relevant. It is also important to show which technical measures were implemented at the workplace. In the case of most businesses there is no need for the highest available security measures, as it is fine if the plaintiff has a risk-based approach on such measures.

While the appetite of judges at different Regional Courts might be different, it seems that at the Metropolitan Court the relevant judges are eager to hear such cases. An obvious reason for this is that the judges at this court also hear IP matters, so they are familiar with the concepts as well as the enforcement tools.

Requesting a preliminary injunction (PI) is an obvious enforcement tool to obtain quick relief. In one matter the Metropolitan Court ordered this *ex parte*, but the Metropolitan Appeal Court as second instance court set this aside and expressed that the defendant must be heard in each case. An *inter partes* PI also makes more sense for practical purposes as the order is delivered to the defendant by the court (compared to an *ex parte* PI decision where delivery must be through a court bailiff in the course of judicial enforcement). A PI can be a powerful tool to put pressure on the defendant, because if the PI order is actually enforced by a court bailiff, but the defendant refuses to comply with the order, then this triggers a fine, in the form of a daily amount set by the court within the range of HUF 10,000 (approx. EUR 30) and HUF 200,000 (approx. EUR 550). An important feature of this fine is that this doubles after each month of non-compliance, so within a few months this can build up to a significant amount to be paid by the defendant to the state.

It is possible to request a PI before commencement of main proceedings or together with submitting the motion, i.e., during the main proceedings. In the former case, if a request for a PI is granted then the main action must be

commenced within 15 days after receipt of the decision in order to maintain the effect of the PI. In PI matters the court usually makes a decision without holding a hearing. In the main proceedings, the court holds at least one hearing on which – if requested by the parties – witnesses are also heard.

If the defendant forwarded documents to their private email or cloud storage account operated by third parties, then it makes sense to involve such service providers as defendants and request them to comply with a PI and later a permanent injunction. In practice, this means requesting them to block certain documents in the defendant's account and then to delete such documents. While official delivery to foreign cloud service providers can take some time, this can be a very useful tool as otherwise, i.e., without a court ordering them to do so, they might refuse to co-operate.

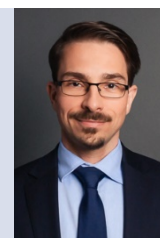
Summary

As stated at the start of this article, it remains to be seen if a sustained increase in trade secret breach cases in Hungary will result from the implementation of new law in 2018, but what is certainly clear is that trade secrets holders now have a range of improved tools to pursue wrongdoers.

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