



BALANCING THE RELEVANT LEGITIMATE INTERESTS IN THE
LEGAL PROTECTION OF TRADE SECRETS IN HUNGARIAN LAW
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Balance in the TRIPs Agreement

- Under Article 1 (2) (...) the term “intellectual property” refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II.
- Section 7 provides for the protection of undisclosed information.→
- even if Article 39 is drafted in light of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention... **trade secret protection is IP protection**
- Paragraph (4) of the Preamble: IP rights private rights, meaning that IP rights are subject of private property
- No dispute settlement cases deal with the nature of the legal protection conferred upon the rightholders of undisclosed information.
- (WTO Dispute Settlement: One-Page Case Summaries, 1995–2020 https://www.wto.org/english/res_e/booksp_e/dispu_settl_1995_2020_e.pdf)

Balance in the TRIPs Agreement – the ECHR

▶ **Trade secret is a category of possession under the European Convention of Human Rights = subject to protection as property**

▶ ECHRASE OF KÖNYV-TÁR KFT AND OTHERS v. HUNGARY(Application no. 21623/13)

New measures introduced a new system of schoolbook - schoolbook supply was a public-interest responsibility of the State.

The applicant companies, schoolbook distributors, complained that the creation of a State monopoly in the schoolbook distribution market had deprived them of peaceful enjoyment of their possessions.

„ ▶ 31. The concept of “possessions” in Article 1 of Protocol No. 1 has an autonomous meaning which is certainly not limited to the ownership of physical goods: certain other rights and interests constituting assets can also be regarded as “property rights”, and thus “possessions” for the purposes of this provision (see *Iatridis v. Greece* [GC], no. 31107/96, § 54, ECHR 1999-II). Rights akin to property rights have existed in cases where, by dint of their own work, **the applicants concerned had built up a clientele. This clientele had, in many respects, the nature of a private right and constituted an asset, and hence a possession within the meaning of the first sentence of Article 1** (see *Van Marle and Others v. the Netherlands*, 26 June 1986, § 41, Series A no. 101, and *Malik v. the United Kingdom*, no. 23780/08, § 89, 13 March 2012). **The applicability of Article 1 of Protocol No. 1 extends, among others, to professional practices, their clientele and their goodwill”**

Balance in the TRIPs Agreement

- Decisive element of balance: How broad is the scope of the property right?
- ► Property rights are not uniform. They might have per se a different scope, and may be limited
- ► ► by various internal ab initio limitations, that follow from the subject-matter of the protection and various public interests that are accepted as the basic interests to be transposed into law, and
- ► ► by conflicting external limitations/exceptions that mirror interests outside the nature and content of the said IP right.
- E.g: copyright:
 - - classical preventive rights (exclusive rights) ,
 - -remuneration rights existing without an exclusive right, and
 - -compensation type sui generis rights (private copy remuneration).
 - **Remuneration right and the compensation type right: specific forms of property rights absorbing implied limitations.**

Balance in the TRIPs Agreement – the rule on trade secret

The existing right	internal limitations
<p>to prevent to disclose or to acquire information lawfully within their control by others without their consent in a manner contrary to honest commercial practice if the info meets the requirement to be an undisclosed information</p>	<ul style="list-style-type: none"> ▶ No breach of contract, no breach of confidence, bona fide acquisition, + ▶ As a consequences of non-disclosure: parallel development, and reverse engineering - per se not acts contrary to honest commercial practices
<p>contrary to honest commercial practice (examples only): breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition</p>	<p>Σ nature of the right as pproperty right</p> <ul style="list-style-type: none"> ▶ a preventive IP right, ▶ an absolute right (against anybody, not only competitors), ▶ no exclusivity, = no prevention against anybody not having the consent of the rightholder, since the teaching of public, the disclosure is lacking, ▶ Internal exceptions and limitations mirror the non-exclusive character.

Balance in the EU Trade Secret Directive

- Preamble (14) a homogenous definition of a trade secret **to cover know-how**, business information and technological information.

trade secret =

- ▶ information,
- ▶ secret in the sense that it is not...generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- ▶ has commercial value because it is secret;
- ▶ reasonable steps under the circumstances were made by the person lawfully in control of the information, to keep it secret;

Know-how as a certain intellectual creation is not distinguished from pure data secret (e.g. a complicated formula to calculate daily/weekly etc. fuel prices at gas stations as compared to an information that an offer was made to buy 25% of shares of a company) in the Directive.

Balance in the EU Trade Secret Directive

The existing right	internal limitations
<p>Preventive right against the unlawful acquisition, use and disclosure of trade secrets.</p> <p>Acquisition: unauthorised access to appropriation of, or copying the media carrying the trade secret, + any other conduct which is considered contrary to honest commercial practices.</p> <p>Disclosure/use: that follows the unlawful acquisition, breach of a confidentiality agreement or any other duty, any mala fide acts, including acts with products and services, where the trade secret was used.</p>	<p>acquisition lawful:</p> <ul style="list-style-type: none"> ▶ independent discovery or creation; ▶ reverse engineering if not prohibited by a contract ▶ any practice in conformity with honest commercial practices, ▶ exercise of the right of workers or workers' representatives to information and consultation in accordance with Union law and national laws and practices (should be and remain external) <p>External limitations made internal (acquisition, disclosure and/or use is lawful)</p> <ul style="list-style-type: none"> ▶ freedom of expression and information as set out in the Charter, ▶ Whistleblowing, provided that the respondent acted for the purpose of protecting the general public interest; <ul style="list-style-type: none"> ▶ disclosure by workers to their representatives provided that such disclosure was necessary for that exercise; ▶ protecting a legitimate interest recognised by Union or national law. (all of them should be and remain external)

Balance in the EU Trade Secret Directive

+ External limitations remaining external (**The Directive shall not affect**):

▶ the exercise of the right to freedom of expression and information as set out in the Charter, + **internal**

▶ **the application of Union or national rules +internal**

▶ ▶ to **disclose**, for reasons of public interest, information, to the public or to administrative or judicial authorities

▶ ▶ requiring or allowing to **disclose** information submitted by businesses in compliance with such laws

▶ the autonomy of social partners and their right **to enter into collective agreements**,

▶ No ground for restricting the mobility of employees:

▶ ▶ limiting employees' **use of information** that does not constitute a trade secret?

▶ ▶ limiting employees' **use of experience and skills** honestly acquired in the normal course of their employment;

▶ ▶ imposing any additional restrictions on employees in their employment contracts other than restrictions in accordance with Union or national law.

Balance in the EU Trade Secret Directive - Contradiction

- Art 11. (2). Member States shall ensure that in (...) assessing its proportionality, the courts shall be required **to take into account**, where appropriate:
 - **(h) the safeguard of fundamental rights. +**
 - **Freedom of expression and compliance with applicable laws on disclosure identified as external+internal limitation→leads to regulatory redundancy and results in confusion.**

Balance in the HU Trade Secret Act(Act 54 of 2018)

Subject -matter	Solution
Distinguishing know-how from pure data	exercise of the right of workers or workers' representatives to information and consultation (acquisition and disclosure) does not cover technology know-how , using the condition included in 5 c) of the the Directive:" provided that such disclosure was necessary for that exercise".
Freedom of expression	Not provided for in the Act, using Art 11 (2) h of the Directive: general obligation of the courts to „to safeguard fundamental rights”
Whistleblowing	The right of disclosure shall not be general, but may only be exercised towards the responsible authorities/courts to avoid detrimental consequences of erroneous whistleblowing

Freedom of expression vs. trade secret in the practice of the Human Rights Court (HUDOC)

- ▶ Case of Herbai v. Hungary (no. 11608/15), [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-180158%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-180158%22]})
- ▶ The applicant was dismissed from his job in human resources in a bank owing to his involvement with (writing and uploading articles to) a website devoted to HR issues.
 - ▶ The Court balanced the applicant's right to freedom of expression against the bank's right to protect its legitimate business interests (trade secret).
 - ▶ Articles on topics that were of interest to a professional audience shall benefit from free speech protection. →
- ▶ **Freedom of expression can be protected effectively also as an external limitation.**
- ▶ **Assessment of fundamental rights is mandatory for courts in Hungary under the practice of the Constitutional Court, even in lack of reference to such rights...**



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