

## Chapter [•]

### Hungary

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#### 1. Introduction

In Hungary there is no single IP Code or legislation. The legally protected interests of holders of intellectual property rights are defined in the acts on different IP rights, i.e. trademarks, geographical indications, patents, plant variety protection, utility model protection, design protection, topography protection and copyright. Beyond these acts, right holders can also rely on additional or related provisions of the Civil Code, the Criminal Code, competition and customs law. However, as the provisions of the Criminal Code relate to IP rights, criminal sanctions cannot be imposed unless infringement is proven under civil law, i.e. under the relevant IP legislation. It is also worth mentioning that while the Trademark Act contains a non-exhaustive list of infringing acts, e.g. offering for sale, importing or exporting, the Patent Act contains a closed list of such activities. The interests protected by the IP acts are set out in the preambles of the respective acts as well.

#### 2. The Scope of Legal Protection of Intellectual Property Rights in Hungary

##### 2.1.1. The Hungarian Trademark Act (Act 11 of 1997)

The preamble of the Trademark Act states that the purpose of enacting the act is to promote the development of Hungarian market economy, to improve competition conditions based on the use of signs capable of distinguishing goods and services, and to assist the public in gathering information.

The holder of the trademark has the exclusive right to use the trademark and is entitled to license the right of use and is entitled to prevent any person not having his consent from using in the course of trade:

- (i) any sign identical with the trademark in relation to goods or services which are identical with those for which the trademark is registered;
- (ii) any sign where, because of its identity with or similarity to the trademark and the identity or similarity of the goods or services, there exists a likelihood of confusion on the part of the public; or

(iii) any sign which is identical with or similar to the trademark in relation to goods and services which are not identical with or not similar to those for which the trademark is registered, provided that the trademark has a reputation in the country and the use of that sign without due cause would take unfair advantage of, or would be detrimental to, the distinctive character or the repute of the trademark.

This means, in particular, that it is prohibited to affix the sign to the goods or to the packaging thereof; to put the goods under that sign on the market, to offer them for sale or to stock them for such purposes; to offer or supply services under that sign; import or export the goods under the sign; use the sign in business correspondence and in advertising.

The circumstances required for a valid interest to be recognized in the protection of a brand are characterized in the list of cases where the holder of a trademark cannot enforce his legal interests if the holder has not put the trademark into genuine use; the trademark rights are exhausted in relation to goods which have been put on the market within the EEA by or with the consent of the trademark holder; the holder has not taken actions against unauthorized use for five consecutive years; or the trademark has lost its distinctive character or become deceptive.

In addition to these scenarios set out above, the recognized interests of right holders are also provided by the clause pertaining to exhaustion. Article 16(2) of the Trademark Act states that the provision of exhaustion shall not apply where the proprietor has a legitimate reason for opposing further trade with the goods, in particular if the state or condition of the goods has changed or been impaired.

Here, Article 16(2) refers to the legitimate interests of the trademark owner in opposing the use of the mark. The Trademark Act itself further lists, albeit not exhaustively, a number of cases to which the proprietor's legitimate interests may be tied; legitimate interests may relate, in particular, to maintaining the good state or condition of the goods to which the mark refers.

#### **2.1.2. The Unfair Market Practices Act / Competition Law (Act 57 of 1996)**

The preamble of the act makes explicit reference to the public interest attached to the maintenance of competition on the market ensuring economic efficiency and social progress, the interests of undertakings complying with the requirements of business fairness and the interests of consumers require the state to protect by law the fairness and freedom of economic competition. In the event that the brand is not protected by a registered trademark, the brand owner may be able to take action on the basis of the provisions on passing-off set out in the Unfair Market Practices Act. According to Article 6 thereof, it is prohibited to manufacture, distribute or advertise products or services without the consent of a competitor, if such goods bear a characteristic sign by which a competitor or his products or services are usually recognized. It is also prohibited to use a sign by which a competitor or his products or services are usually recognized. These provisions shall also apply to trademark protected products though.

In order to qualify for such protection, however, a competitor or his products or services must be usually recognized by that sign.

#### **2.1.3. The Hungarian Patent Act (Act 33 of 1995)**

The preamble of the Patent Act highlights the promotion of technical progress in the Hungarian national economy, the implementation of up-to-date technology, and encouraging inventors both morally and financially. The inventor enjoys moral rights and rights concerning the disclosure of the invention. The person originally mentioned as such in the patent application shall be deemed to be the inventor, unless a final court decision rules to the contrary. The inventor has the right to be mentioned as such in the patent documents. Prior to the publication of the patent application, an invention may only be disclosed with the consent of the inventor.

The holder of the patent has the exclusive right to exploit the invention, and is entitled to license the right to exploit under a contract and receive royalties in exchange; furthermore, the patentee is entitled to prevent any person not having his consent:

- (i) from making, using, putting on the market or offering for sale a product which is the subject matter of the invention, or stocking or importing the product for such purposes;
- (ii) from using a process which is the subject matter of the invention or, where such other person knows, or it is obvious from the circumstances, that the process cannot be used without the consent of the patentee, from offering the process for use;
- (iii) from making, using, putting on the market, offering for sale or stocking or importing for such purposes a product obtained directly by a process which is the subject matter of the invention.

The Patent Act also contains provisions relating to indirect/contributory infringement: the holder of the patent is entitled to prevent any person not having his consent from supplying or offering to supply a person, other than a person entitled to exploit the invention, with means (instruments, appliances) relating to an essential element of the invention, for carrying out the invention, when such person knows, or it is obvious from the circumstances, that those means are suitable and intended for carrying out the invention.

The Patent Act also contains a provision relating to plant variety protection.

#### **2.1.4. The Act on the Protection of Utility Models (Act 38 of 1991)**

The right to utility model protection belongs to the inventor. In any other matters concerning the moral rights of the inventor of the utility model, his remuneration and right to utility model protection, the provisions of the Patent Act shall apply.

The holder has the exclusive right to exploit the utility model or to license another person to exploit it. The exclusive right of exploitation shall include the manufacture, use, putting on the market or offering for sale of a product that is the subject matter of the utility model, or stocking or importing the product for such purposes within the framework of economic activity.

#### **2.1.5. The Design Act (Act 48 of 2001)**

The creator of the design enjoys moral rights and rights concerning the disclosure of the design. These include that the person who has created the design shall be deemed to be the designer. Unless a final court decision rules to the contrary, the person originally mentioned as such in the design application shall be deemed to be the designer.

The right to design protection belongs to the designer. The designer has the exclusive right to exploit the design and is entitled to prevent any person not having his consent from exploiting the design. Exploitation shall cover, in particular, the making, using, putting on the market, offering for sale, importation, and exportation of the product embodying the design, as well as the stocking thereof for such purposes.

The designer is entitled to transfer, assign and pledge rights, with the exception of moral rights, deriving from the design and the design protection. Furthermore, the designer may license the right to exploit under a contract and is entitled to receive royalties in exchange.

#### **2.1.6. The Copyright Act (Act 76 of 1999)**

The preamble of the Copyright Act states the following: „Modern copyright legislation that keeps up with technological development plays a decisive role in encouraging intellectual creation and preserving national and universal cultural heritage; it creates and maintains the balance between the interests of authors and other rightholders, users and the broader public, taking into account the demand for education, culture, scientific research and free access to information“

The holder of the copyright, i.e. the author, enjoys moral and economic rights. Moral rights comprise the right to have the work published, the right of attribution and the right to preserve the integrity of the work.

In the circle of economic rights, the author has the exclusive right:

- (i) to use his entire work or an identifiable part thereof, in any tangible or intangible form and to authorize each and every such use (use means, in particular, reproduction, distribution, public performance, communication to the public by broadcasting or in any other manner, adaptation and exhibition thereof)
- (ii) to use the particular title of the work
- (iii) for the commercial exploitation of any typical and original character appearing in the work and the authorization of such exploitation.

The author is furthermore entitled to remuneration in return for authorizing the use of his work.

### **3. Protection of Intellectual Property Rights in Matters of Distribution**

#### **3.1. After-sales Matters**

The effective legislation does not provide variations in the level of protection brands may enjoy according to the type of distribution of goods or services. Nevertheless, Article 16 (2) of the Trademark Act does contain an exception under exhaustion of trademark rights, whereby the holder has legitimate reasons to oppose further commercialization of goods, in particular, where the condition of the goods has been changed or impaired. This may be triggered in relation to luxury goods, for example. However, we are not aware of any relevant case law in Hungary.

Besides the rule of exhaustion and the above mentioned provision of the Trademark Act the different IP acts do not address the area of after sales services. Contractual limitations may be enforced under general civil law but only between parties to the given agreement; contractual limitation may not be enforced against third parties. This means that parties may stipulate certain limitations within an agreement, which will therefore not apply to third parties. Neither do the different IP acts differentiate between on- and offline distribution.

According to the Trademark Act, the trademark holder has the exclusive right to affix a sign to goods or to the packaging thereof to determine the terms of usage of the protected name or symbol in the context of on- and off-line distribution and after-sales service relating to a product branded with the trademark; to put the goods under that sign on the market or offer them for sale or stock them for such purposes; to offer or supply services under that sign; to import or export the goods under that sign, and to use that sign in business correspondence and advertising.

However, trademark protection does not entitle the holder to prohibit a third party from using the sign in the course of trade and, in accordance with the requirements of fair trade practice, indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of the goods or of the rendering of the service, or other characteristics of the goods or service, or the trademark where it is necessary to indicate the intended purpose of the goods or services, in particular, in the case of accessories or spare parts.

According to Hungarian case law the holder of a trademark can, to some extent, determine the terms of usage of the protected name or symbol in the context of on- and off-line distribution and after-sales service relating to a product branded with the trademark in question. A distributor or a third party can use the word trademark of the holder or the text form of the trademark, in physical form or on its website, for informative purposes, as a reference to the genuine goods or services. However, such use should not be excessive; it should neither undermine the reputation of the trademark nor imply that there is a direct/special business relationship between the distributor and the manufacturer/trademark holder. It should not suggest that the distributor is part of the trademark owner's sales network either. According to case law, a distributor cannot register a trademark as part of a domain name except for where the domain name makes it clear that the website is not related to the manufacturer/trademark owner, e.g. by assigning the word 'used' to the brand. In this latter case, it is also important to mention that such a website should offer only genuine products and only those of the same brand.

Furthermore, in relation to figurative trademarks, a distributor should not use a figurative trademark unless it is required to designate the goods distributed by the distributor.

### **3.2. Geo-blocking**

Hungarian legislation regarding intellectual property rights does not prohibit geo-blocking, and as such does permit right holders to engage in such a practice. Should geo-blocking, however, give rise to unfair market practices this may result in the imposition of sanctions under competition law. Although the Unfair Market Practices Act does not contain expressis verbis provisions addressing geo-blocking, it does prohibit the abuse of a dominant position. This means specifically that in the case of transactions which are equivalent in terms of value or character, it is prohibited to discriminate, without justification, against trading parties, including in relation to the application of prices, periods of payment, discriminatory selling or purchase terms or methods, thereby placing certain trading parties at a competitive disadvantage. Geo-blocking may lead to such discrimination and, as such, those players who enjoy a dominant position in a particular market, i.e. persons who are able to pursue their economic activities to a large extent independently of other market participants without the need to substantively take into account the market reactions of their suppliers, competitors, customers and other trading parties in deciding their market conduct, may find themselves the subject of investigation and face sanctions imposed by the Hungarian Competition Authority.

### **3.3. E-commerce Platforms**

The issue of the rights and possibilities of intellectual property holders against the providers of e-commerce and communication platforms is essentially a question of whether the latter shall be considered service providers or intermediary service providers. The liability of both is regulated in Hungary by the E-commerce Act [Act 108 of 2001], which implements the E-commerce Directive (Directive 2000/31).

In the event that providers of such platforms are considered service providers, they shall be held liable for any unlawful information they have made available. In this case, intellectual property holders may avail themselves of the rights and possibilities provided under the IP acts and the general rules of the Civil Code and the Criminal Code.

However, if providers of such platforms are considered intermediary service providers, e.g. hosting providers, then exceptions do apply, although it is unclear whether such exceptions can really be relevant in the case of e-commerce platforms, especially if these are actually selling goods or providing services instead of simply acting as intermediaries.

The exceptions apply only on the condition that platform providers do not have actual knowledge of unlawful activity related to the information or they are not aware of the fact that the information infringes the right or legitimate interest of any party; upon obtaining such knowledge of the above facts they act expeditiously to remove or to disable access to the information; they apply the 'notice and take down procedure'.

The 'notice and take down procedure' is set forth in the E-commerce Act (Act 108 of 2001). The holder of a trademark may request the removal of information – excluding the standardized address of the access to the information – which infringes its rights and was made accessible by the service provider, by way of sending a notice in the form of a notarized deed or a private document of full probative force to the service provider.

The notice shall contain the following: (i) the subject of the infringement and the facts that provide reasonable cause to believe that infringement has taken place; (ii) the data needed to identify the unlawful information, and (iii) the name, address of residence or head office, phone number and electronic mail address of the right holder.

The service provider should arrange for disabling access to or removal of the information identified in the notice, within twelve hours of receiving the notice and should give written notice to the affected recipient of the service who had provided the information that infringes the right of the right holder within three working days.

The service provider should refuse to disable access to, or remove the information pursuant to the notice, if the service provider has already previously taken the measures in relation to the same information based on the notice of the same right holder, unless the removal of, or disabling access to the information was ordered by a court or authority.

Within eight days of receiving the notice of the service provider, the affected recipient of the service may lodge an objection with the service provider, in the form of a private document with full probative force or a notarized deed, regarding the removal of the relevant information. The objection shall indicate the identification of the information removed or made inaccessible, and a statement with detailed explanation that the information provided by the recipient of the service does not infringe the right of the right holder. Upon receiving the objection, the service provider shall expeditiously make the relevant information accessible again and notify the right holder thereof by sending the objection to the right holder, unless the removal of, or disabling access to the information was ordered by a court or authority.

However, if the affected recipient of the service admits the infringement of the rights of the right holder or does not lodge an objection within the above mentioned time frame, or the objection does not contain the relevant information and statement, the service provider shall maintain the effect of disabling access to, or removal of the information.

Should the right holder enforce his claim related to the infringement of right specified in the notice within ten working days after receiving the notice of the objection through a request of preliminary injunction for abandonment and prohibition or of an order of payment or file a criminal report with the police, within twelve hours of receiving the court decision ordering interim measures, the service provider shall once again disable access to, or remove the information. The service provider shall notify the affected recipient of the service of the measure that it has taken within one working day by supplying a copy of the court decision.

The right holder should notify the service provider about the final decision of the court without delay. The service provider shall expediently obey such decisions.

The service provider shall not be liable for the successful removal of, or disabling access to the relevant information, when the service provider has acted in accordance with the provisions above in good faith to ensure removal or disabling access thereto.

### **3.4. Reverse Engineering and De-compilation**

Reverse engineering is regulated with respect to know-how as well as in the context of the software-related provisions of the Copyright Act (Act 76 of 1997). Know-how is currently protected by the Civil Code; Hungary is, however, in the process of implementing the EU's Trade Secrets Directive (2016/943). Once this has been completed, the protection of business secrets and know-how will be governed by a separate act.

According to the current (old) provisions, know-how protection does not apply where a person obtains the know-how, or any knowledge which essentially has the same attributes, by way of testing or analysing a lawfully acquired product or lawfully received service.

Under Article 59(3) of the Copyright Act, the authorised user of a software product may, without the author's authorisation, observe and study the operation of the software, and may make a trial use thereof in the course of its loading, displaying on a monitor, running, transmission or storage in order to understand the idea or principle which serves as a basis for any element of the software product.

Article 60 of the Copyright Act contains the provisions on decompilation. These are essentially in line with the provisions of Directive 2009/24 on the legal protection of software products. Reproduction or translation of a code which is indispensable for the acquisition of the information necessary for the combined operation of an independently created software with another software is possible, provided that (i) these acts of use are performed by the authorised user or another person entitled to use the copy of the software or a person put in charge of performing these acts by these persons; (ii) the information necessary to the combined operation has not been easily accessible to the persons referred to in clause a) above; and (iii) these acts of use are limited to those parts of the software which are necessary for ensuring the combined operation.

The information obtained through such decompilation must not be (i) used for a purpose other than the combined operation with the independently created software; (ii) communicated to another person unless this is required for the combined operation with the independently created software; (iii) used for the development, production and putting into circulation of another software essentially similar as regards its form of expression, or for other acts resulting in the infringement of the copyright.

Furthermore, decompilation is only permitted if it complies with the general preconditions of free use.

## **4. Limitations of Legal Protection Regarding Intellectual Property Rights**

### **4.1. Exhaustion**

The general standards for exhaustion in Hungary stem from the conflicting interests of the holders of the intellectual property rights and the interests of resellers, downstream service providers and end users. In principle, by purchasing a product, customers - for example, resellers or distributors -, acquire ownership of the product itself; they are thereby entitled to do as they wish with the product, including reselling it to other customers. Exhaustion of intellectual property rights allows this principle to prevail in cases where such products are protected by an IP right.

Exhaustion also enables the free movement of goods as one of the main freedoms in the European Economic Area, since the geographical scope of exhaustion overrides the territorial nature of IP rights.

Exhaustion is governed by the relevant legislation pertaining to IP rights, i.e. in the legal provisions of the Trademark Act, Patent Act, Copyright Act, Act on the Protection of Utility Models, Design Act and Act 39 of 1991 on the Legal Protection of Topographies of Microelectronic Semiconductor Products.

#### **4.1.1. Scope of Exhaustion in the Trademark and in the Patent Act**

Since the general standards of exhaustion are identical for all IP rights in Hungary, the Trademark Act and Patent Act may serve as examples of the legal provisions of exhaustion, and explain the criteria and requirements for such in the context of these Acts.

Article 16 (1) of the Trademark Act defines the scope of exhaustion declaring that “Trademark protection shall not entitle the trademark proprietor to prohibit use of the trademark in relation to goods that have been placed on the market in the European Economic Area by the proprietor or by others with his express consent.” The second paragraph – quite uniquely among the different IP Acts - provides examples for the right holder’s legitimate reasons for objecting against exhaustion: “The provision contained in Subsection (1) shall not apply where the proprietor has a legitimate reason for opposing further trade with the goods, in particular if the state or condition of the goods has changed or been impaired.”

Article 20 of the Patent Act contains a rule similar to the corresponding provision of the Trademark Act, albeit without specifying the legitimate interests of the right holder: “The exclusive right of exploitation provided under patent protection shall not cover further acts related to a product marketed within the European Economic Area by the holder of the patent or with his express consent, unless the holder of the patent has reasonable interest to prevent further marketing of the product.”

These legal provisions embody the essence of the regulations. The geographical scope of protection follows the concept of regional exhaustion, since the IP rights of a Hungarian right holder can be exhausted on the market in the European Economic Area.

The key trigger for exhaustion is the act of putting the products on the relevant market, i.e. the precise wording “have been placed on the market”, as provided in the Trademark Act, signifies that assignment of the product’s ownership, that the product enters the commercial channels, is the most relevant criteria. In this respect, the Court of Justice of the European Union defines this criterion as: “A sale which allows the proprietor to realise the economic value of his trademark exhausts the exclusive rights conferred by the Directive, more particularly the right to prohibit the acquiring third party from reselling the goods.”<sup>1</sup>

Besides the general rules, the Patent Act contains specific provisions related to exhaustion of biotechnological patents and plant variety protection.

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<sup>1</sup> ECJ, case C-16/03, *Peak Holding AB v Axolin-Elinor AB, formerly Handelskompaniet Factory Outlet i Löddeköpinge AB*, ECR 2004 I-11313.

In the case of biotechnological inventions, exhaustion is limited. Namely, the exclusive right of exploitation conferred by the patent shall not extend to biological material obtained from the propagation or multiplication of biological material put on the market in the territory of the EEA by or with the express consent of the patentee, where the propagation or multiplication necessarily results from the application for which the biological material was marketed, provided that the material obtained is not subsequently used for other propagation or multiplication. In other words, exhaustion of rights related to a biological material obtained from the biological material marketed with the consent of the patentee is only established upon the fulfilment of both of the above conditions.

In line with the Directive cited above, Article 20/A (5)–(7) of the Patent Act contains regulations relating to farmers' privilege as an exemption from the protection of patented biological material. The relevant provisions stipulate that the sale or other form of commercialization of plant propagating material to a farmer by the patentee or with the latter's express consent implies authorization for the farmer's use of the product of his harvest for propagation or multiplication on his own farm. The Patent Act refers to Article 14 of Regulation 2100/94 on conditions for such entitlements for farmers.

Similarly, the sale or other form of commercialization of breeding stock or other animal reproductive material to a farmer by the patentee or with the latter's express consent implies authorization for the farmer to use the patented livestock for agricultural purposes. This includes the use of the animal or other animal reproductive material for the purposes of pursuing his activity, but shall not extend to sale within the framework or for the purpose of a commercial reproduction activity.

As such, exhaustion is essentially triggered by the actual sale of the specific goods; advertising or storing of the product does not lead to exhaustion of IP rights, and regulations may differ in respect of special kinds of IP rights.

#### **4.1.2. The Geographical Scope of Exhaustion**

As Hungary is a member state of the European Union, Hungarian regulations on exhaustion of IP rights are harmonized with EU legislation, with exhaustion regulated regionally and the European Economic Area being the relevant market.

The Hungarian regulation does contain exceptions to the doctrine of exhaustion and both the Trademark Act and Patent Act set out such.

Article 16(2) of the Trademark Act, as cited above, states that the right holder's "legitimate reason" for prohibiting the further sale of his products constitutes an exception to the doctrine of exhaustion. The Trademark Act goes on to provide an example of such a legitimate reason, which may be invoked in the event of the condition of the product being changed or even impaired. It is important, however, to point out that this is a non-exhaustive list and further activities may be deemed to harm the legitimate interest of the right holder.

According to Hungarian and EU legal practice preventing the detrimental use of a trademark with good reputation<sup>2</sup> or using a trademark in a manner that gives the impression that there is a business connection between the reseller and the right holder,<sup>3</sup> constitute the right holder's legitimate interest.

According to the doctrine of exhaustion as defined in the Patent Act, the exclusive right of exploitation conferred by patent protection shall not extend to acts concerning a product placed on the market in the territory of the EEA by the patentee or with his express consent, except where the patentee has legitimate interests in opposing the further marketing of the product (Article 20 of the Patent Act). This provision has been rarely addressed within judicial practice, so what precisely may be considered legitimate interests is as yet still unclear.

The burden of proof lies with the alleged infringer, i.e. the defendant in a court action. In general, the claimant, being the right holder of the IP right, initiates the lawsuit and in so doing shall (as described in the relevant

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<sup>2</sup> ECJ, case C-337/95, *Parfums Christian Dior SA and Parfums Christian Dior BV and Evora BV*, ECLI:EU:C:1997:517.

<sup>3</sup> ECJ, case C-63/97, *Bayerische Motorenwerke AG (BMW) and BMW Nederland BV and Ronald Karel Deenik*, ECLI:EU:C:1999:82.

Hungarian IP regulations) prove two criteria, namely, the existence of an IP right belonging to him and the defendant's infringing activity.

As a (possible) counter argument, the defendant shall prove that his activity was legitimate, in other words, that the claimant gave his express consent for the sale of goods or that the doctrine of exhaustion applies.

#### **4.1.3. Exhaustion in the Case of Digital Goods**

Given that Hungary is a member state of the European Union, EU legislation and legal practice developed by the Court of Justice of the European Union governs the applicability of exhaustion with regard to digital goods.

The relevant EU laws are, however, somewhat imprecise on whether exhaustion applies to digital goods. In Hungary, digital goods fall within the scope of copyright but, unlike physical goods as regulated by the Trademark Act or Patent Act, transfer of ownership will not necessarily take place in a physical sense but rather, for example, through licensing.

This still developing area was touched upon in CJEU ruling in C-128/11 *Usedsoft v. Oracle*, where Oracle distributed computer software by allowing customers to download the software onto their computers while also concluding a license agreement with customers to enable them to use the software.

The CJEU based its decision principally on the Software Directive and stated that exhaustion applies both to downloading a copy of a computer software application from the internet onto a data carrier and to the resale of a user license involving the resale of a copy of a computer program downloaded from the copyright holder's website.<sup>4</sup>

In the event that digital goods are tied to a physical medium, for example, computer software on a CD, they are protected by the Hungarian Copyright Act, according to which, a creative work (i.e. computer software on a CD) does not need to be registered by any authority to be protected by copyright; copyright protection belongs to the author from the time of the work's creation, regardless of any registration.

#### **4.1.4. The Matter of Harmonisation Regarding Exhaustion Rules in the EU – Balance Between the Rights of Consumers and Right Holders**

There is a tendency within the EU towards harmonizing the rules on exhaustion. Regulation 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union Trademark already contains a common doctrine of exhaustion in Article 15 for EU trademarks. In the field of patents, Regulation 1257/2012 of the European Parliament and of the Council of 17 December 2012 implements enhanced cooperation in the creation of unitary patent protection rules on exhaustion of European Patents with unitary effect. National laws are in line with these provisions, clearly demonstrating that regional harmonization has already taken place. From a Hungarian perspective international harmonization ensuring a minimum level of uniform requirement for national trademarks would also be beneficial for right holders.

We believe the Hungarian regulation, harmonized with the relevant EU legislation, strikes a good balance between the interests of resellers, distributors and end users by regulating the doctrine of exhaustion and the interests of right holders by permitting a reasonably broad scope of exception, through the "legitimate reason" of the right holder explored above.

The relative lack of judicial practice would indicate that the regulation is essentially clear for both right holders and infringers.

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<sup>4</sup> CJEU, case C-128/11 *Usedsoft v. Oracle*, ECLI:EU:C:2012:407, pt 47 : "Since an acquirer who downloads a copy of the program concerned by means of a material medium such as a CD ROM or DVD and concludes a licence agreement for that copy receives the right to use the copy for an unlimited period in return for payment of a fee, it must be considered that those two operations likewise involve, in the case of the making available of a copy of the computer program concerned by means of a material medium such as a CD ROM or DVD, the transfer of the right of ownership of that copy."

Given the regional nature of exhaustion, parallel import of goods within the EU is permitted. Special Hungarian regulations are in effect with respect to the parallel import of medicines for human use. Requirements for such are governed by Regulation No. 449/2017. (XII. 27) on the authorization of the wholesale and parallel import activity of medicines, hereinafter referred to as “Parallel Import Regulation”.

According to Article 6 of the Parallel Import Regulation, the notion of parallel import covers, amongst other activities, acquiring medicine in the country of origin; importing medicine for the purpose of distribution, repackaging, quality assurance and quality assessment thereof; storing, stockpiling and registering; shipping to the customer; removing from commercial circulation, in addition to keeping records, and supplying data and information regarding the medicine subject to parallel import.

#### **4.2. Anti-trust Law and IP Rights**

As a member state of the European Union, harmonized EU competition/antitrust laws are in effect in Hungary too and as such the same EU principles apply in Hungary in terms of how the interests of IP right holders and competition/antitrust laws intersect. The free movement of goods within the EU helps create a supranational territory where goods may enter and leave countries without interference. Meanwhile, intellectual property rights create exclusivity for right holders and are tied to specific territories.

The Patent Act, however, contains no specific competition/antitrust provision, so any potential antitrust agreement or market activities should be evaluated based on the general rules set out previously.

Although for a long time it seemed that the “single market” concept of the European Union would prevail, supported, for example, by exhaustion of IP rights within the European Economic Area (EEA), limitations have been imposed on EU competition/antitrust laws in recent years. In the Coty decision,<sup>5</sup> the Court of Justice of the European Union found that the selective distribution system for luxury goods complies with the relevant EU competition laws, provided the conditions laid down in the Coty decision are met.

The Coty ruling was issued by the CJEU on 6 December 2017 and is therefore relatively recent; how national courts and the CJEU will interpret the criteria contained in the ruling, i.e. “luxury goods” or “proportionate”, is still a question.

It is also worth noting that Hungarian legislation recognizes the “selective distribution system” as a limitation to competition/antitrust law, since Regulation No. 205/2011. (X. 7.) on exempting some vertical agreement groups from the prohibition of unfair competition states that “selective distribution system” is an exception from an unfair vertical agreement.

#### **4.3. Limitations Imposed on Downstream Markets – Software-as-a-Service**

As previously mentioned, CJEU decision in *Usedsoft v. Oracle*<sup>6</sup> established that a computer program downloaded from the internet shall be considered to have been sold, which, through the doctrine of exhaustion of rights, creates a limitation for the right holder over its IP right, thereby enabling buyers in the downstream markets to resell the software they have downloaded. In Hungary, just as in the European Union, the exhaustion of IP rights therefore serves as a limitation to right holders on their exclusive rights.

The same applies to the limitation on bundling sales, since the Unfair Market Practices Act / Competition Law, just as the relevant European legal provisions, prohibits bundle selling. Article 21(f) prohibits the abuse of a dominant position, specifically, to render the supply and acceptance of goods contingent upon the supply or acceptance of other goods, or to render the conclusion of a contract conditional upon undertaking any commitment which, due to its nature or with regard to the usual contractual practice, does not form part of the subject of the contract.

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<sup>5</sup> CJEU, case C-230/16, *Coty Germany*, ECLI:EU:C:2017:941.

<sup>6</sup> CJEU, case C-128/11, *Usedsoft v. Oracle*, ECLI:EU:C:2012:407.

In our experience, the abuse of a dominant position by an IP right holder has not yet been dealt with in Hungarian judicial practice, therefore making it hard to determine how this actually impacts IP right holders' control over the after-sales services.

## **5. Consumer Interests in Competition Law**

Article M) paragraph 2) of the Fundamental Law (the Constitution) contains that Hungary protects consumers' rights. However, the Fundamental Law does not contain further provisions, these are rather set out in the Consumer Protection Act [Act 155 of 1997] and the Act on Prohibition of Unfair Commercial Practices [Act 157 of 2008], which implemented the Unfair Commercial Practices Directive of the EU. In consumer protection cases, the provisions of these latter acts are usually cited and reference is rarely made to Section M) paragraph 2) of the Fundamental Law. It is important to mention that historically Hungarian courts have been reluctant to apply provisions of the Fundamental Law (the Constitution). Constitutional rights of consumers are not limited to protection against state actions.

In competition/antitrust law cases consumers' interests are considered only in the event that the activity in question breaches competition law, thereby harming or putting at risk consumers' interests. In such cases competition law and protection of consumers' interests go hand in hand.

We believe that in the majority of cases the economic approach in competition/antitrust law is sufficient to capture consumers' interests.

### **5.1. A Reversal of the Burden of Proof**

Based on Article 14 of Hungarian Act 47 of 2008 on the Prohibition of Unfair B2C Commercial Practices, the burden of proof for the violation of consumer interest lies with the business entity, which means that at the request of the competent authority the business entity shall provide proof to verify the authenticity of any fact comprising its commercial practices. In the event of the business entity's failure to comply, the fact in question shall be construed as untrue. The authority's notice shall contain a warning for the business entity to this effect.

This regulation is in line with Article 12 of EC Directive 2005/29, which requires the reversal of the burden of proof (the business entity shall furnish evidence as to the accuracy of factual claims in relation to a commercial practice). This rule differs from the general rules of administrative procedure, in which the authority is required to clarify the facts of the case and to furnish evidence in support of its claims. The purpose of the reversal of the burden of proof is that the business entity shall bear responsibility for what it claims in the form of commercial communication, thus, the present attribution of the burden of proof is appropriate.

### **5.2. Aftermarket Repair Considerations**

According to Article 17(2) of the Design Act, a protected design does not entitle the holder to prohibit a third party from using such a design for the purpose of repairing a complex product in order to restore its original appearance, provided that the latter uses it in accordance with honest practices in industrial or commercial matters.

Hungarian legislation provides no general requirement concerning the obligation to provide a replacement once the warranty/guarantee period has expired. Nevertheless, the ECJ ruling in *Volvo v. Veng* is applicable insofar as the exercise of an exclusive right arising from intellectual property cannot in itself be regarded as an abuse of a dominant position. There is no published case law on the application of this ruling though.

In terms of Hungarian and EU block exemption regulations, it can be established that the following contractual clauses may be considered anti-competitive conduct:

- (i) vertical agreements concluded by a supplier of spare parts and a manufacturer of final products, according to which the supplier may only sell replacement parts to those final users or service providers, or other service providers who are in a contractual relationship with the manufacturer for the provision of repair or maintenance

- (ii) selective distribution agreements in the motor vehicle sector which render it impossible to sell replacement parts to independent repairers.

### **5.3. Product Liability**

Hungarian consumer protection legislation and the Civil Code set out mandatory regulations relating to terms of guarantee and product liability, meaning these cannot be limited by the manufacturer. The manufacturer may be exempted from liability if it can prove that the reason for the defect occurred subsequent to performance, i.e. once the product had been supplied to the customer.

In the event that the manufacturer has contractually undertaken a guarantee (without statutory obligation), it may freely set the conditions, although, according to the basic principles of contract law, such terms shall not constitute unfair contractual terms; the user of general contractual terms shall draw the other party's attention to unusual clauses, for example, "breaking of seals" terminates the guarantee.

## **6. Balancing Consumer and Market Interests in Legislation**

In adopting new legislation, the relevant ministry shall conduct a balance of interest test to consider the impacts of the new legislation. Consumers' interests are usually considered during this assessment.

As far as brands are concerned, consumers' interests are usually considered in relation to counterfeiting and privacy. The general view is that the current provisions on exhaustion of trademark rights and other limitations provide third parties – including consumers – with the necessary protection against misuse of trademark rights.

### **6.1. Direct Regulations**

The Trademark Act itself contains provisions *directly* relating to consumers' interests:

- (i) Absolute grounds for refusal: a sign may not be granted trademark protection, if it is liable to deceive consumers as to the nature, quality, geographical origin or other characteristics of the goods or services.
- (ii) Relative grounds for refusal: a sign may not be granted trademark protection, if, because of its identity with or similarity to the earlier trademark and the identity or similarity of the goods or services, there exists a likelihood of confusion on the part of the consumers, and the holder of the earlier mark is entitled to prevent any person not having his consent from using such a sign in the course of trade.
- (iii) The protection of the trademarks having a reputation may also be considered as relating to consumers' interests.
- (iv) An agreement for the assignment of trademark protection shall be null and void where the assignment is likely to mislead consumers.
- (v) A license agreement which is likely to mislead the consumers shall be null and void.
- (vi) The holder of the trademark may have the right of information against any person who was found in possession of infringing goods on a commercial scale; was found to be using infringing services on a commercial scale, or was found to be providing on a commercial scale services used in infringing activities.

The right of information extends to information on the identity of persons involved in the production and distribution of the infringing goods or the provision of infringing services and of their channels of distribution. Acts are considered to be carried out on a commercial scale if it is obvious from the nature and quantity of the infringing goods or services that these acts are carried out for direct or indirect economic or commercial advantage. However, in the absence of proof to the contrary, acts carried out by consumers in good faith shall not be regarded as acts carried out on a commercial scale.

- (vii) A sign shall be excluded from trademark protection as a collective mark if consumers are liable to be misled as regards the character or the significance of the mark, in particular, if it is likely to be perceived as other than a collective mark.

## 6.2. Indirect Regulations

The Trademark Act also contains provisions which relate *indirectly* to consumers' interests:

- (i) The further grounds for refusal and the legal consequences of trademark infringement serve to protect consumers in a wider sense.
- (ii) Trademark infringement has consequences under customs law; the holder may request a customs action from the relevant authority to prevent the entry of the goods affected by the infringement into the domestic market. This provision also indirectly protects the interest of consumers.
- (iii) In Hungary it is possible to grant trademark protection to a sign as collective or certification marks. These marks are also related to consumer protection as they directly express the quality of the goods.

## 6.3. Relevant Case Law

As it stands, there are no significant Hungarian cases where the balance of the interests of holders of intellectual property rights and consumers was found to be inappropriate. There was one particular case in which consumers' interests were used as part of the defence against trademark infringement. In the Hungarian LEGO® case, the courts found that LEGO's Hungarian figurative trademarks on the shape of certain building bricks were not only valid,<sup>7</sup> contrary to the findings of the CJEU in , but they also ruled that importing, offering for sale, selling etc. bricks which are of a similar design, even if they are differently branded and therefore not counterfeit, constitutes passing-off under Article 6 of the Unfair Market Practices Act.<sup>8</sup> In this particular case, neither the Court of Appeal nor the Supreme Court accepted that consumers' interests should be taken into account in terms of whether competing products with similar design on the Hungarian market would facilitate competition.

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<sup>7</sup> Supreme Court of Hungary – now Curia of Hungary, decisions of 9th July 2008 Pfv.IV.22.098/2007/8., Pfv.IV.22.102/2007/8., Pfv.IV.22.097/2007/8., Pfv.IV.22.099/2007/8., Pfv.IV.22.100/2007/8.

<sup>8</sup> Supreme Court of Hungary – now Curia of Hungary - Pfv. 20.791/2011/4.