S Z E C S K A Y
Ügyvédi Iroda - Attorneys at Law

H-1055 BUDAPEST, KOSSUTH TÉR 16-17
(MAIL: H-1245 BUDAPEST PF / POB 1228)
HUNGARY

Tel: +36 (1) 472 3000 • Fax +36 (1) 472 3001 • info@szecskay.com • www.szecskay.com

NEWSLETTER
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THE "UNDERGROUND PARKING LOT CASE IN SOPRON"

Dr. Zoltán Balázs Kovács, LL.M.

The Supreme Court's decision in this Sopron underground parking lot case has been one of the hottest topics in the legal playing field in the past few months. We briefly discuss the decision below, and describe a possible way to solve the problems it has raised.

(1) THE "SOPRON UNDERGROUND PARKING LOT" CASE

The litigating parties concluded an agreement whereby the defendant undertook to build a public parking lot underneath the real property owned by the Municipality of Sopron. The real property in question qualified both as a public square and as one of the municipality's "primary assets". The defendant also undertook to reconstruct the surface of the public square. The parking lot was to be operated by the defendant on business terms, and the parties agreed that it would be registered under a separate topographical lot number and then transferred to the defendant's ownership upon registration.

The parties acted in accordance with the terms laid down in the agreement - the real property was divided and the permit issued for construction, which was due for completion during the litigation.

The plaintiff (the municipality) requested the court to establish that the agreement was null and void.

(2) SUPREME COURT DECISION

The Supreme Court established that the agreement was null and void due to the fact that "*the ownership title to a structure built on, beneath or above the surface of a real property that may not be subject to sale may only be acquired by the owner of the land; as a consequence, ownership of a real property that may not be subject to sale may not be divided.*"

The Supreme Court argues that "*the fact that a real property may not be subject to sale means on the one hand that there may not be a change in the owner of such real property, not even by way of a so-called "original method of acquisition" and also implies a considerable restriction of the owner's rights. Said restriction means that the real property may not be sold and may not even be encumbered.*"

An "original method of acquisition" is a type of acquisition that does not presume that there was a previous owner of the real property. Acquiring ownership on the basis of an authority resolution qualifies as an original method of acquisition.

(3) PROBLEMS TRIGGERED BY THE SUPREME COURT DECISION

In the past few years, several agreements similar to the one in the Sopron case have been concluded. Numerous investments were commenced, mainly by foreign investors, on the basis of the "in rem" encumbrance of a real property that may not be sold due to qualifying as a municipality's primary asset. A number of bigger municipalities concluded agreements similar to the Sopron case to build a parking lot underneath a primary asset real property. Based on these agreements, the investor generally undertook to fully reconstruct the surface above ground in exchange for ownership of the parking lot. These investments have typically been funded by bank loans where the underground parking lot owned by the investor serves as one of the collaterals for the loan. It is yet to be analyzed under what conditions these investments could be continued, or indeed whether continuing such investments would be in the interest of the investors.

It is still uncertain whether the municipalities will challenge the legality of agreements similar to that addressed in the Sopron case. One issue of concern for investors is whether there is any specific date after which they, or any third party acquiring ownership from the investor, can feel safe that their ownership will not be challenged in any way.

If the investor as the registered owner of the underground parking lot does not sell the parking lot to a third party, the municipality may assert their ownership right against the investor at any time, with no time limit. This is because ownership claims do not lapse under the Hungarian Civil Code.

If the investor has sold his parking lot to a third party, "*legal proceedings for cancellation may be initiated against a bona fide person acquiring a right by subsequent registration, by confiding in the validity of the previous registration, within sixty days of delivery if the original resolution on invalid registration was delivered to the aggrieved party. Legal proceeding for cancellation may be initiated within three years from the date of registration if no such delivery has taken place.*" Consequently, a municipality can assert its ownership claim against a bona fide third party within 3 years from the date of registration. An investor registered as the owner of a parking lot will therefore probably be unable to sell it, as third parties are unlikely to want to risk a

potential ownership claim by the municipality for three years from the date of registration of its ownership.

If the investor does not sell the underground parking lot, it is questionable how municipalities would be able to provide proper compensation if they asserted their ownership claim, particularly with high-value investments. In most cases, it would presumably not be in the municipalities' interest to initiate legal proceedings for cancellation. Nevertheless, investors will still be in a very precarious situation with an underground parking lot that is practically impossible to sell.

(4) PROPOSAL FOR SOLUTION

In light of the Supreme Court decision, the ownership title to real property legally qualifying as primary assets may not be transferred, and real property like this may not be encumbered with "in rem" rights (e.g. usufruct, usage right etc.) In addition, an "asset management right" may not be established on such real properties (this is not permitted by the Municipality Act).

Large-scale investments cannot be implemented without "in rem" collaterals. This therefore raises the question of how municipalities will be able, taking the current legal background into account, to find investors for investments to be made under or on the surface of public squares. If investors cannot acquire in rem rights on the real property they wish to construct (and which may be worth several billions of Hungarian forints), the financing of investments through the establishment of "in rem" collaterals on the respective real property would basically be unfeasible.

The solution could lie in a decision - dealing with re-zoning - delivered by the Supreme Court a few months ago (Decision KGD2008.107), wherein the Supreme Court ruled that "*municipalities may alter the classification of only those real properties that have previously been qualified by the municipalities themselves as real properties that may not be subject to sale. Real properties that qualify by law as real properties that may not be subject to sale may not be re-qualified by the municipality as real properties that may be sold.*" At the same time, the Supreme Court also established that "the municipality is authorized to alter the characteristics of a real property through a so-called "re-zoning" procedure." This is where "*the council of representatives at the municipality initiates authority proceedings with a view to separating assets which do not serve any municipal duties and jurisdiction and are therefore not to be regarded as assets qualifying as primary assets from those that may not be subject to sale. Such assets subject to separation may not be sold or encumbered and may not serve as collateral as long as said authority proceedings are not completed and the affected real properties are registered with the land registry as a public square, public road or public park*".

Based on court decision KGD 2008.107, a real property may be sold and encumbered after completion of the cited authority proceedings. However, it remains to be

addressed exactly what kind of real property does not serve any municipal purpose or jurisdiction and is therefore not to be regarded as assets qualifying as primary assets and may, consequentially, be separated from primary assets by way of re-zoning.

It is questionable whether, without re-zoning, a primary asset can be subject to any contractual obligations. The lease of an asset that may otherwise not be subject to sale would likely not be illegal. However, it is more than likely that only concepts of public law, such as the so-called operation right or PPP may provide a solution to the problem. Even if the relevant real property can be subject to a lease, the lease itself does not make it feasible to establish "in rem" collaterals on the respective real property when it comes to bank financing. In terms of a lease, the somewhat unflexible rules set forth by the relevant municipality on the lease of municipality-owned premises are likely not capable of managing a long-term relationship. In case of an operation right or PPP that also involves a concession agreement, it is questionable whether the revenues generated by the investor's project company through their operation or concession activity would serve as satisfactory security for the financing bank. In light of general banking practice, it is doubful whether a bank would feel satisfied with the assignment of the revenues as the only collateral. This, however, depends on the agreement between the investor and the bank. It also appears to be possible to provide the bank with the quota/share held in the project company as collateral, provided that the concession agreement also makes this feasible (i.e. the municipality consents to providing the bank with such a collateral).

THE RESTRAINED INTERPRETATION OF REPUTED TRADE MARKS IN THE EUROPEAN COURT OF JUSTICE'S JUDGMENTS IN INTEL AND TDK CASES

Dr. Miklós Boronkay

In its recent judgments in the Intel and TDK cases (nos. C-252/07 and C-197/07 respectively), the European Court of Justice (ECJ) laid down the conditions under which the owner of a reputed trademark can enjoy protection that goes beyond the trademark's listed goods.

In the Intel case, the ECJ laid down the relevant criteria for establishing whether a link exists between an earlier reputed mark and the later mark. This link is needed in order for the trademark to be further protected beyond the list of goods. The criteria include, for example, the similarity between the later mark and the reputed mark, or the similarity between the list of goods, the strength of the earlier mark’s reputation and the degree of the earlier mark’s distinctive character.

However, as a precondition for wider protection, the ECJ established that the owner of the trade mark must prove that there has been a change in the economic behaviour of the average consumer of the goods or services for which the earlier reputed mark was

registered since the use of the later mark, or that there is a serious likelihood of this in the future.

The ECJ placed a significant burden of proof on the reputed trademark owner, whereby it would have to endure the usage of the later mark for some time in order to be able to carry out a consumer survey. Moreover, it may be feared that in a trademark infringement case, the national court will not grant interim measures and the outcome of the litigation itself is uncertain.

Two weeks after this strict measure was introduced, a further order came from another ECJ chamber in the TDK case, which somewhat overshadowed the initial measure. According to this later order, it is not necessary to demonstrate actual and present injury to the earlier mark: it is sufficient to produce evidence that enables the conclusion prima facie that there is a risk, which is not hypothetical, of unfair advantage or detriment in the future. This puts trademark owners into an easier situation compared to the Intel case. However, any risk that is not hypothetical can only be interpreted as a real and actual risk. This interpretation can easily lead to an obligation where trademark owners will have to prove that there will actually (not hypothetically) be a change in the economic behaviour of the average consumer regarding the class of goods or services of the trademark allegedly infringed.

The Intel case was connected to a proceeding for declaring the invalidity of a trademark, in which the ECJ interpreted Directive 89/104/EEC. In the TDK case, an application for registration as a Community trademark was the subject of the case according to Regulation No. 40/94. Nevertheless, the ECJ's statements in both cases can be considered a reference point for interpretation of both the Directive and the Regulation (which contain identical provisions), and also in trademark infringement disputes. (However, it is must be noted that the protection of reputed trademarks as contained in the Directive is not obligatory for the Member States of the EU; it is only an optional provision.)

CHANGES IN REGULATION OF THE PROMOTION OF MEDICINES

Dr. Miklós Boronkay

The first quarter of 2009 saw considerable change in the regulation on the promotion of medicines. Changes included modifications to Act XCVIII of 2006 on the General Provisions Relating to the Reliable and Economically Feasible Supply of Medicinal Products and Medical Aids and on the Distribution of Medicinal Products (the Medicine Promotion Act). New rules on the detailed regulation of the promotion of medicines also came into force from the Health Ministry in the shape of regulation no. 3/2009, which supersedes Health Ministry Regulation no. 11/2007. The changes were triggered by the advertising law reform in September 2008 (consisting of the amendment of the Competition Act and of the Consumer Protection Act and the

entering into force of the new Advertising Act and Unfair Commercial Practices Act). The terminology of the provisions on medicine advertisements and detailing has therefore been brought in line with the general legal provisions of advertising. The modification affected the definition of detailing, the administrative and payment obligations of the detailing companies, and the rules on liability.

The former notion of the term 'detailing of medicines' raised some doubt. The obvious interpretation of this term is that, as opposed to usual advertising, detailing refers only to communications that are (i) addressed to professionals (doctors and pharmacists) who are entitled to order and distribute medicines, and (ii) which contain information on ingredients, effects and application. In practise however, things are very different. The Health Insurance Supervisory Authority (HISA) considered several activities as detailing, when in fact these were, in practice, business/commercial activities (provision of information on medicines' prices, taking promotional orders, etc.) The new definition of detailing puts the law-abiding public into a difficult position because it defines detailing as a 'commercial practice', when this includes any kind of information, activity, visualisation method, marketing, or other commercial communication aimed at the promotion of the medicine's ordering, purchasing, selling or consuming. The only exception contained in regulation no. 3/2009 is that commercial communications that are applied also towards consumers are not considered detailing of medicines.

Pursuant to the modified rules, medicine detailing companies are no longer obligated to report to the HISA the gifts and sponsorship they provided to doctors and pharmacists in the last year and which are planned to be provided next year.

The reinstated 'registration fee' places a further significant burden on detailing companies. While previously annulled by the Constitutional Court, the fee was reinstated by the Medicine Promotion Act (with distinctions as demanded by the Constitutional Court). Detailing companies must therefore pay the state HUF 416,000 per month per employee that carries out detailing of medicines.

Lastly, the rules of liability regarding the provisions on detailing have changed. It must be noted in these new provisions that both the person carrying out detailing and his/her employer are only liable for the infringements of the rules pertaining to themselves. This rule is objectionable on two grounds. On the one hand, it is unusual in Hungarian law for employees or permanent agents to be liable towards third parties (in this case the HISA); it is more usual that the employer or principal is liable. On the other hand, it is questionable on constitutional grounds whether a fine of HUF 25 million can be imposed on a private person pursuant to the general provisions of the Administrative Proceedings Act and not in accordance with the rules on misdemeanour proceeding, which is now possible according to the Medicine Promotion Act.

The purpose of this Newsletter is to provide general information regarding the issues set out above. This Newsletter is a publication of Szecskay Attorneys at Law and cannot be regarded as legal advice or legal opinion under any circumstances. With respect to any specific legal queries and more information, please seek legal assistance.

For more information, please contact:

info@szecskay.com
H-1055 Budapest, Kossuth tér 16-17
(Mail: H 1245 Budapest Pf/POB 1228)
Hungary
Tel: +36 (1) 472 3000 • Fax +36 (1) 472 3001
www.szecskay.com