

## Conclusion

The aim of this study was to determine the content of the notion of Trade Mark with Reputation that was introduced in the Czech law upon enacting the Trade Mark Act as a result of transposition of EU directives in order to harmonise Czech trade mark law with trade mark laws of other Member States, to clarify the consequences the trade mark law associates with the existence of a trade mark reputation and the qualifications under which it does so.

Whereas a trade mark belongs to the intangible property protected by law, reputation itself does not. It is a fact, a feature or an intangible value, the trade mark may be a bearer of. It was construed that due to several legislative changes the trade mark may be deemed a thing in the legal perspective, though a thing *sui generis*, of course. If we compare rights to tangible things (i.e. right to a thing in the traditional sense) with a right to a trade mark we can find significant as well as insignificant differences in the aspect of exercising ownership rights, in the aspect of formation or extinction of an ownership right, or in the aspect of exercising a right to a thing that belongs to somebody else. The right to a trade mark differs from the right to tangible property in particular in the specific, qualified way in which the trade mark becomes a subject of ownership, in the specific way it is transferred and in several manners of extinction. The said particularities are implied by the intangible nature of the trade mark, the regulation of which is based on a formal, registering principal. Nevertheless, these particularities are not that special to justify their incapability to be a thing in a legal sense. Current legislation implies that the right to a trade mark is an independent subject-matter of legal relations, trade mark is no longer bound to a company or to the core business of the entitled person. The right to a trade mark is an absolute and proprietary right. Trade mark may be, *inter alia*, possessed, used, enjoyed and disposed of. It may be co-owned and it may be pawned. It may be inherited, and as a part of business assets it may be included in a company liquidation, it may be a subject of a verdict or execution order, it may be included in the bankruptcy estate in bankruptcy proceedings or in a list of possessions in the settlement and composition proceedings.

The law associates certain consequences with the fact that a trade mark has a reputation. These consequences consist in an extended applicability of rights

implied by the trade mark, e.g. prohibition orders implied by the exclusive proprietor's right to its trade mark may be applied even in cases where a proprietor of a trade mark without a reputation cannot apply such orders. It is a so-called extended protection of a trademark with a reputation. Such extended protection means that if certain qualifications are met the law extends the prohibition to use conflict signs to all products and services, and, in case that the extended prohibition is violated or threatened, confers on the proprietor certain procedure rights it would not enjoy otherwise, or more precisely, it would enjoy only in respect of signs used for specified products or services. On one hand, no threatening confusion of signs is needed to apply this protection, however, other qualifications must be met. Provision of the law regulating these qualifications shall be construed in compliance with the sense and purpose of the Directive and in accordance with the practice of the European Court of Justice.

A trade mark must be reputable for a majority of the relevant public in a major part of the territory of the Czech Republic. Relevant public means the existing and potential consumers and customers of products and services protected by the trade mark. In addition to quantitative aspects, a trade mark with a reputation is also associated with qualitative aspects referring to all positive, subjective associations the relevant public may have about the goods labelled with the trade mark, that may have a positive influence on the commercial value of the goods and that facilitate sales of such goods. Nevertheless, I assume that recognition of a trade mark's reputation should not be conditioned by demonstration of the existence of such qualitative aspects relating to the trade mark. Demonstration of their existence would only be reasonable in case that the entitled entity objects against a conflict sign, which it considers unfairly abusing or harming the said positive associations forming a part of the reputation.

Another vital condition for application of extended trade mark protection is the identity or similarity of a conflict sign with the trade mark. The degree of similarity between the trade mark and the conflict sign must be such that the relevant public might associate them.

Eventually, the last condition of application of the extended trade mark protection is the fact that using a conflict sign (without the proprietor's consent) would

take an unfair advantage of or would be detrimental to the distinctive character and reputation of the trade mark as a result of associating the conflict sign with the trade mark by the relevant public due to their similarity and the reputation of the trade mark.

The case of taking an unfair advantage of the distinctive character is frequently referred to as a case of "advantage of attention", which means that an entity other than the trade mark proprietor strives to abuse the trade mark's ability to draw attention which positively stimulates the public's decision making whether or not to purchase the goods, or unproportionally to the expended costs it leverages some of the older trade mark's promotion power for the benefit of the used sign.

The case of detriment to the distinctive character of the trade mark is frequently referred to as "disintegration" of trade mark when the distinctive character of the trade mark is impaired due to an unlawful act by a third party. Under certain circumstances it may happen that the business activities of the trade mark proprietor degrade and erode the distinctive character of the trade mark, in other words, the association between the trade mark and the goods and business source to which the trade mark is attached will no longer be obvious and unambiguous to consumers. The trade mark will thus lose its uniqueness and individuality, it becomes disintegrated, diluted. Its attractiveness and ability to motivate consumers to purchase goods to which such trade mark is attached weakens.

Taking an unfair advantage of the trade mark's reputation is frequently referred to as an "abuse of reputation". The merits thereof consists in using the conflict sign by a non-entitled entity with the aim to take the advantage of certain value associated with the trade mark, i.e. all positive ideas and connotations the public associates with the original sign. The core of the abuse of a trade mark's reputations lies in the effort to transfer some of such positive associations to the conflict sign.

The alternative to the detriment to the trade mark's reputation is referred to as an "injury of a reputation" and applies to situations when using of a conflict sign could injure the image or reputation the trade mark enjoys with the public. It is a detrimental intervention to the integrity of the sign, i.e. to its ability to evoke a complex of positive

association in the public, which facilitate the sales of goods to which the trade mark is attached. The reputation can thus be injured by using the conflict sign in obscene, discrediting or otherwise negative circumstances, or in circumstances which are not negative themselves, nevertheless, are inconsistent with the special image the older trade mark with a reputation enjoys with the public.

The extended protection of trade mark with a reputation may be understood as a protection of trade mark's promotion function, as a legal protection of values developed by business activities of its proprietor and as a protection of undisturbed use of the fruits of such business activities which often required vast financial investments.