PREVENTIVE MEASURE

The Regional Court in Ostrava decided on 19 October 2004 in the legal matter of the Plaintiff M. against Defendant No. 1, E. and Defendant No. 2, CZ.NIC, on the petition for the issue of a preventive measure in the proceedings on the protection of rights violated by unfair competition, as follows:

I. Defendant No. 1 is obliged to refrain from dealing with the rights of the holder of the domain names x+y+z.cz and t+u+v.cz.

II. Defendant No. 1 is obliged to ensure that her web administrator (operator of webhosting) cancels all diversions from the domain names of x+y+z.cz and t+u+v.cz to web pages, electronic mail and other electronic services and is obliged to suffer this cancellation of diversion.

The Plaintiff in her case, which reached the court on 14 October 2004 (in the wording of the addition received by the court on 15 October 2004), demands protection on the one hand in the matter of the infringement of rights to the name of a legal entity and further as the owner of registered trademarks and in the matter of unfair competition on the part of Defendant No. 1. At the same time the Plaintiff proposed the issue of a preventive measure in the wording formulated in Sentences I and II of this ruling.

The Plaintiff states in her case that she was established on 26 June 1992 by registration in the Commercial Register and that she does business in the field of the production of plastic packaging and the production of products from polyethylene foam and carries out all further activities connected with the ensuring of the production and sale of polyethylene foam for the purpose of its further sale. Since 1993 she has designated the products sold with the name "T+U+V". The Plaintiff has the names X+Y+Z and T+U+V protected by national trademark for packaging material made of plastics and polyethylene foam and also for commercial activity connected with these products.

Defendant No. 1 was established on 18 November 1994 and from 1999 extended her subject of business to activity identical to that of the Plaintiff. The agent and partner of the firm of Defendant No. 1 L. Š. was formerly the employee of the Plaintiff, and latterly handled the sales of the Plaintiff's products, so that he knew that the names X+Y+Z and T+U+V are protected by a national trademark. With effect from 9 February 2000 Defendant No. 1 had the domain name of a+b+c.cz registered with Defendant No. 2 and subsequently from 24 February 2000 registered the domain names of x+y+z.cz and t+u+v.cz. She began to use all three domain names as an address, the entering of which opens the same Internet pages of Defendant No. 1, on which she promotes her firm and her products, by means of which she competes with the services and products of the Plaintiff provided under the names X+Y+Z and T+U+V. The Plaintiff ascertained that a customer who knows her goods under the name of X+Y+Z and T+U+V, after entering these names in the national domain of CZ, then orders the products and services of Defendant No. 1, although he originally intended to order the products and services of the Plaintiff. Defendant No. 1 is committing actions in economic competition that are at variance with the good morals of competition and are able to cause detriment to the Plaintiff and to consumers. Defendant No. 1 further prevents the Plaintiff from the obligation to use her registered trademark, because after she registered the wording of the Plaintiff's trademarks as her own domain names she made it impossible for the Plaintiff to carry out the registration of the domain names X+Y+Z and T+U+V in the national top level domain of CZ, all in the malign intention of damaging the Plaintiff. At the same time Defendant No. 1 does not use the names X+Y+Z and T+U+V for the designation of her goods.

In her case the Plaintiff further declares that Defendant No. 1 has enriched herself groundlessly through unfair competition and also through the infringement of the rights to trademarks and to the commercial firm of the Plaintiff. The level of the undeserved enrichment is equal to the amount,

which Defendant No. 1 would have had to pay for the licence if the Plaintiff provided it to her for the use of the names X+Y+Z and T+U+V. In the course of the four years before the bringing of the case Defendant No. 1 enriched herself at the expense of the Plaintiff by the sum of at least 8,000,000 CZK.

The Plaintiff proposed that the court should issue a preventive measure through which Defendant No. 1 would be forbidden until the termination of this conflict to deal in any way with the rights of the holder of the domain names x+y+z.cz and t+u+v.cz, and Defendant No. 1 would also be enjoined until the termination of the conflict to suffer that on entering the illegally used domain names her web pages will not open on the Internet and she will not receive the electronic mail of the Plaintiff.

According to Par. 102 section 1 of the Civic Court Rules, if it is necessary after the starting of proceedings to regulate the relations of the participants temporarily or if there is fear after the opening of proceedings that the execution of the ruling finally issued in the proceedings might be threatened, the court may order a preventive measure.

According to Par. 76 section 1 letter f) of the Civic Court Rules the court may impose on a participant by means of a preventive measure that he do something, refrain from something or suffer something.

In the given case the Plaintiff demanded the ordering of a preventive measure for the requirement of the temporary regulation of the relations of the participants.

According to the provision quoted above of Par. 102 section 1 of the Civic Court Rules and according to established judicature the prerequisite for the ordering of a preventive measure by which the relations of the participants are to be regulated is on the one hand the verification of the right and on the other hand verification that the need for the regulation of relations is urgent.

From the documents listed below, submitted by the Plaintiff together with the suit, the court accepted the following facts as proven:

- Through the complete extract from the Commercial Register kept by the Regional Court in Ostrava, Section C, entry 0000, Invoice No. 44103, publicity material, the price list of the Plaintiff from 1993 and extracts from the register of trademarks, that the Plaintiff was recorded in the Commercial Register under the name of X+Y+Z, spol. s r.o. (Ltd.) on 26 June 1992 and from that moment has as the subject of business written the activity "production of packaging from plastics" and the "production of goods from polyethylene foam and the execution of all further activities connected with the ensuring of the production and sale of polyethylene foam". She has designated the products sold since 1993 with the name T+U+V. The Plaintiff is the owner of a combined trademark with the wording x+y+z, registration No. 123456, for the classes of products and services 16, 17, 20, 28 and 37, with right of priority dated from 19 December 1995. The Plaintiff is also the owner of a combined trademark in the wording t+u+v, registration No. 234567, for the classes of products and services 17, 20 and 37, with right of priority dated 28 December 1995.
- Through the complete extract from the Commercial Register kept by the Regional Court in Ostrava, section C, entry 0000, that Defendant No. 1 was recorded in the Commercial Register on 18 November.1994 under the name E+T+U+V, spol. s r.o. and with effect from 21 June 1999 changed the commercial firm to E. spol. s r.o. Since 18 November 1994 she has had written as the subject of business the activity of the "purchase of goods for the purpose of their further sale and sale" and from 21 June 1999 she has also inserted the "production of goods from polyethylene foam and the execution of all other activities connected with ensuring production and sale". From 2 November 1995 the function of agent is carried out by L. Š.
- Through extracts from the register of domains and extracts from the register of trademarks that Defendant No. 1 has been since 9 February 2000 the holder of the domain a+b+c.cz and from 24 February 2000 the holder of the domains x+y+z.cz and t+u+v.cz. Defendant No. 1

submitted to the Office of Industrial Ownership in Prague applications Nos. 345678, 456789, 567890, 678901 and 789012 for the registration of trademarks in the wording X+Y+Z, www.x+y+z.cz, T+U+V, www.t+u+v.cz and www.t+u+v.com.

- Through the copy of the order of customer B. of 1 July 2004, the reaction of Defendant No. 1 to this order of 2 July 2004 and the copy of an e-mail on the carrying out of a check on the products of the Plaintiff, that Defendant No. 1 receives correspondence intended for the Plaintiff.
- Through the extract from the Internet pages of Defendant No. 1, that she uses for the designation of her products the names D+E+F, G+H+I and J+K+L.
- Through the appeal of the Plaintiff of 15 July 2004 and the letter of Defendant No. 1 of 30 July 2004, that the Plaintiff appealed (through her patent representative) to Defendant No. 1 to refrain from illegal activity in connection with the use of the domains x+y+z.cz and t+u+v.cz. Defendant No. 1 told the Plaintiff that she was the authorised holder of the above domains and was not considering transferring them in any manner.

It can therefore be summed up that the Plaintiff demonstrated that the right to the wording of the commercial firm of X+Y+Z, the right to the designation of products with the name T+U+V and the right to the registered trademarks x+y+z and t+u+v are older in time than the right of Defendant No. 1 to the domains of x+y+z.cz and t+u+v.cz. The Plaintiff and Defendant No. 1 compete on the market with their business activities (they have an identical subject of business). No web page is connected to the domains of x+y+z.cz and t+u+v.cz, nevertheless on entering these domains the Internet user is diverted to the web page of Defendant No. 1 www.a+b+c.cz with offers of similar services to those provided by the Plaintiff. The designations X+Y+Z and T+U+V do not have any connection with the firm of Defendant No. 1 (as opposed to that of the Plaintiff), who does business under the name of E. and also promotes and sells her products under completely different designations (D+E+F, G+H+I and J+K+L). It is therefore possible to agree with the Plaintiff that Defendant No. 1 registered the domain names x+y+z.cz and t+u+v.cz with the intention of damaging the Plaintiff, in which she is undoubtedly successful, for instance in acquiring customers to the detriment of the Plaintiff and in devaluing trademarks.

With regard to the fact that the Plaintiff and Defendant No. 1 are doing business in the same field, the behaviour of Defendant No. 1 also shows the characteristics of unfair competition in accordance with Par. 44 section 1 of the Commercial Code, as well as the traits of the factual basis of the misleading designation of goods and services (Par. 46 of the Commercial Code), the causing of the risk of confusion (Par. 47 of the Commercial Code) and acting as a parasite with respect to reputation (Par. 48 of the Commercial Code).

With regard to the above there has been proved in the opinion of the court the urgency of the need to regulate the relations of the Plaintiff and Defendant No. 1 to prevent the occurrence of further detriment. The suit itself was demonstrated in the same way to the extent that it would be possible to order the preventive measure.

With the aim of temporarily (until the issue of the decision on the case itself) preventing Defendant No. 1 from in any way dealing with the rights of the holder of the domain names x+y+z.cz and t+u+v.cz and temporarily preventing Defendant No. 1 from the opening of her web page when these domain names are entered, as well as to prevent Defendant No. 1 from receiving the electronic mail of the Plaintiff, the court complied with the petition for ordering a preventive measure. It must be stated that it cannot even be deduced that the order contained in the preventive measure would be an excessive intervention in the rights of Defendant No. 1.

A decision will be made on the compensation for costs occurring for the participants in connection with the preventive measure in relation to the ruling on the case itself (Par. 145 of the Civic Court

Rules).

Only the first letter of their surnames or commercial firms designates the participants in the proceedings, with the exception of the association of CZ.NIC. The domain names concerned are replaced by the sequence x+y+z.cz. If there is mention in the text of further domain names, these have been replaced at random by other sequences of symbols. With the exception of data enabling the identification of the participants in the proceedings or other persons and domain names there has been the least possible interference with the text of the rulings. Any connection of the abbreviations and substitute symbols used with persons or domain names that actually use designations with the use of such abbreviations or substitute symbols is purely coincidental.

In the study of the rulings it is necessary to bear in mind the fact that the decision contains not only the actual statement of the Court and its substantiation, but also a summary of the statements of the individual parties, some of which statements the Court need not have taken into account at all in the decision (e.g. in the issue of a preventive measure) and these statements therefore represent only the legal opinion of the party concerned and not the conclusion of the Court.

A Court ruling cannot be automatically applied to other cases (albeit the basic facts are the same) and the CZ.NIC association recommends that a concrete case be consulted with experts on domain names and with lawyers.