SUPREME COURT - DENIAL OF AN APPEAL

In the legal case of Plaintiff K.S., a.s. against Defendant No. 1 CZ. NIC and Defendant No. 2 M.-S., spol. s r.o., pertaining to the fulfillment of obligations ensuing from the contract on the registration of a domain name and protection against unfair competition, which was originally heard before the District Court of Justice in Prague, on March 14, 2006 the Supreme Court of the Czech Republic ruled as follows on the appeal filed by Defendant No. 2 against the April 23, 2005 ruling of the High Court of Justice in Prague:

- I.The appeal is denied.
- II.Defendant No. 2 is required to pay the Plaintiff compensation for expenses related to the appeal proceedings in the amount of CZK 1,625.00 within three days of the date on which notification of the legal enforceability of this judgment is delivered to its representative.

Through its ruling of June 2, 2004, the District Court of Justice in Prague ordered Defendant No. 1 to allow the Plaintiff to register as owner of the internet domain "systemy.cz" in the register (database) of first level "cz" domains administered by Defendant No. 1 and accessible at the address http:/www.nic.cz and to enable the Plaintiff to make full use of the domain "systemy.cz" (Verdict Section I); and Defendant No. 2 is obligated to refrain from using the domain "systemy.cz" (Verdict Section II). The court also ruled that the Plaintiff and Defendant No. 1 do not have the right to claim compensation for their legal expenses on each other (Verdict Section III) and that Defendant No. 2 is obligated to pay the Plaintiff compensation of expenses for the proceedings (Verdict Section IV). The first instance court based its ruling on the determination that the Plaintiff, as of the date it commenced business, also performs activities in the area of providing software and that in 1997 it registered the internet domain "systemy.cz" with the legal predecessor of Defendant No. 1 and used this domain until August 6, 2001, at which time the Plaintiff's access to the domain was blocked and the contents were deleted and replaced. On August 14, 2001, the domain registration was transferred from the Plaintiff to Defendant No. 2 on the basis of an order issued by Ing. M.H., former member of the Plaintiff's Board of Directors and designated administrator. The first instance court ascertained that that the Plaintiff holds precedence in the registration and use of the "systemy.cz" domain. From the perspective of the Regulations for the Registration of Domains and the Regulations for Communication, Authorization and Verification of Changes (hereinafter referred to as Regulations) issued by Defendant No. 1 and binding for all parties concerned , the court evaluated the position of Ing. M.H. in relation to the Plaintiff at the time the domain was transferred as that of mandator and mandatary (Section 566 et seq. of the Commercial Code and Section 724 et seq. of the Civil Code) as at the time in question Ing. M. H. was no longer a member of the Plaintiff's Board of Directors, i.e.., was not the person authorized to perform activities related to the technical operation of the domain on behalf of the Plaintiff. The Court reached the conclusion that, during the transfer of the domain to Defendant No. 2, the administrator overstepped his authority and, as the Plaintiff did not approve this action in accordance with Section 33 Paragraph 1 of the Civil Code but, to the contrary, acted to prevent the transfer, the transfer never became legally effective. In relation to the subsequent relationship between Ing. M.H. and Defendant No. 2, in whose interest and for whose benefit the legal transfer was performed, the first instance court concluded that Defendant No. 2's actions clearly meet the criteria as defined by the general provisions on unfair competition as the actions were in conflict with the ethics of competition and also met the actual principle of parasitizing on the reputation and unapproved use of special designations, which were considered to be characteristics of the Plaintiff within client circles. Because the result of the ruling against Defendant No. 1, as the registrar of domain names, is tied to the results of the ruling against Defendant No. 2, the court also considered the claim as also being just against Defendant No. 1, although the actions on its part were not of an illegal nature due to the fact that it had been dealing with the Plaintiff, specifically Ing. M.H., over the

long-term and thus it did not doubt the re-registration of the domain as it did not know, and could not have known, that the administrator had overstepped his authority.

During the appeal proceedings filed by Defendant No. 2, the High Court of Justice in Prague, with its ruling of April 23, 2005, confirmed the judgment passed by the first instance court in Verdict Sections I and II, stating that Defendant No. 1 is obligated to register the Plaintiff as the owner of the "systemy.cz" domain in the register of first level "cz" domains and to enable the Plaintiff to make full use of the domain "systemy.cz"; and Defendant No. 2 is obligated to refrain from using the domain "systemy.cz". This court amended the decision on the expenses for the proceedings and ruled on the compensation of expenses for the appeal proceedings. The appellate court fully accepted the actual findings of the first instance court. It denied the appellant's objections regarding the incorrect evaluation of the issue of the existence of a competitive relationship between itself and the Plaintiff. It reached a different legal conclusion on the relationship of Ing. M. H. and the Plaintiff. It considered the application of Section 724 et seq. of the Civil Code as incorrect and emphasized that Ing. M.H. had a relationship comparable to a mandator/mandatary relationship with the Plaintiff only during the period of time for which he was a member of the Board of Directors (Section 66 Paragraph 2 of the Commercial Code). However, even after he ceased to be a member of the Plaintiff's collective statutory body, he only continued acting with the Plaintiff's original authorization. The legal tasks he performed during this period could thus not have and did not have the anticipated legal effect. In spite of this conclusion however, the appellate court deduced that the Plaintiff could have been damaged by the actions of Ing. M.H. that were performed for the benefit of Defendant No. 2 and thus subsequently by the actions of Defendant No. 2, as it was Defendant No. 2 who used the "systemy.cz" domain for its business activities, which, up until that time, had been used by the Plaintiff in an uninterrupted manner, and therefore Defendant No. 2 acted on conflict with the ethics of competition and such behavior was sufficient to cause the Plaintiff to suffer damages. The fact that the Plaintiff lost the possibility of presenting itself on the internet under the "systemy.cz" address caused it to be edged out of the competition to a significant degree. On the other side, by replacing the contents of the internet pages with its own text, Defendant No. 2 obtained a competitive advantage. The court concluded that, as far as Defendant No. 1 is concerned, the assignment to perform the registration of the domain is necessary in order to restore the original satisfactory condition. As far as Defendant No. 2 is concerned, the request to refrain from using the "systemy.cz" domain corresponds to the fact that Defendant No. 2 did not acquire rights to the domain and, by using the domain, participated in illegal unfair competitive behavior towards the Plaintiff. The court thus designated the ruling passed by the first instance court as materially correct. The court justified the modification to the verdict on the expenses for the proceedings on the basis of an incorrect formulation of the relationship between the Plaintiff and Defendant No. 2, whereby the first level court applied the provisions of Section 150 of the Civil Procedure Code in the relationship between the Plaintiff and Defendant No. 2 by increasing the declared expenses for the proceedings by the amount of VAT taking into consideration that the Plaintiff's representative is a VAT payer.

Defendant No. 2 challenged the entire verdict passed by the appellate court through an appeal, founding its argument on the provisions of Section 237 Paragraph 1c) of the Civil Procedure Code and justification therefor based on the provisions of Section 241a Paragraph 2b) of the Civil Procedure Code. Defendant No. 2's objection was based on the fact that the decision made by the appellate court is not supported by any of the proof presented in the issue of evaluating the relationship between Ing. M.H. and the Plaintiff, as the Plaintiff only claimed that the administrator had overstepped his authority but never proved her claim. Defendant No. 2 considered the decision as incorrect as it was made by applying the provisions of Section 566 and Section 66 of the Commercial Code, and stated that the issue should have been evaluated according to Section 724 of the Civil Code. Defendant No. 2 supported the opinion that its competitive relationship with the Plaintiff was incorrectly evaluated, that the Plaintiff did not prove the existence of a competitive relationship, and that the appellate court,

in the justification it provided for its verdict, did not take measure of the appellant's objections that had been made regarding this issue in the appeal that was filed. Defendant No. 2 objected to the conclusions made by the appellate court, in which the court found that the defendant had acted in conflict with the ethics of competition. Defendant No. 2 stated that the Plaintiff's claim that the "systemy.cz" domain is characteristic for it is untrue and that the Plaintiff had never proved this claim. Defendant No. 2 is convinced that the justification presented by the appellate court is conflicting from the perspective of logic, even in relation to the biased opinion that the opinion presented in the judgment on the relationship to one of the defendants is directly dependant on the opinion on the relationship to the other defendant. For the stated reasons, Defendant No. 2 asked that the ruling made by the High Court of Justice be annulled and that the case be returned to the appellate court for further proceedings.

In its response, the Plaintiff asked that the appeal be denied, as, based on its conclusions, the decision in question is not of principle significance from the legal perspective and the ruling of the appellate court is not in conflict with material law. In the event that the court hearing the appeal considers the appeal as admissible, the Plaintiff asked that the appeal be denied, as the evaluation of the issue of whether the performance of the administrator's activities is judged according to Section 566 and Section 66 of the Commercial Code or according to Section 721 of the Civic Code is not legally significant in and of itself and a condition for unfair competitive behavior cannot be the fact that the party acting unfairly is aware that its behavior is of an unfair competitive nature, thus the appellant's claim of good faith when using the domain in question cannot hold up. As far as the appellant's claim regarding the issue of a competitive relationship, the Plaintiff pointed out the fact that the ruling passed by the appellate court is in continuity with consistent court practice.

As the proceedings before the court of first instance (and the rulings of the courts of both instance) were completed after January 1, 2001, the provisions of the amended Civil Procedure Code in effect after January 1, 2001 shall be applied to the appeal proceedings in accordance with Paragraphs 1, 15, and 17 of Title I, Section 12 of Act No. 30/2000 Coll., which amended Act No. 99/1963 Coll., the Civil Procedure Code, as amended.

Pursuant to the provisions of Section 236 Paragraph 1 of the Civil Procedure Code, a legally enforceable ruling made by a appellate court can be challenged if the law so allows.

Pursuant to Section 240 of the Civil Procedure Code, any participant in the proceedings can file an appeal. However, the nature of an appeal as a corrective measure implies that only a participant to the proceedings who received full satisfaction from the ruling made by the appellate court, or a participant who suffered certain damages to its rights, has the right to file an appeal. The decisive verdict whereby the appellate court accommodated the suit in relation to Defendant No. 1 could not have caused Defendant No. 2 to suffer any damage to its rights that could be rectified through appeal proceedings.

The appeal to this ruling made by the appellate court was thus filed by someone who did not have the right to file an appeal. The Supreme Court therefore denies the appeal filed by Defendant No. 2 against the verdict in question pursuant to the provisions of the first sentence of Section 243b Paragraph 5 and the first sentence of Section 218 Point b) of the Civil Procedure Code.

An appeal against the first judgment of the appellate court, which confirmed the ruling of the first instance court as pertains to Defendant No. 2, is admissible only in accordance with the provisions of the first sentence of Section 237 Paragraph 1 of the Civil Procedure Code if the court hearing the appeal reaches the conclusion that the decision being appealed is of significant legal importance in the case at hand. Such situations primarily involve cases whereby the decision being appealed resolves legal questions that have not yet been addressed by the appellate court, or if the case at hand is decided differently by the appellate court or the court hearing the appeal, or if it addresses a legal

issue that is in conflict with material law (Section 237 Paragraph 3 of the Civil Procedure Code).

In order for an appeal to be admissible in accordance with the provisions of Section 237 Paragraph 1c) of the Civil Procedure Code, the issue being resolved must have determinate significance for deciding the case in question, i.e., it cannot involve an issue on which the appellate court's opinion was based from the perspective of legal evaluation. The judgment passed by a appellate court thus has fundamental legal significance primarily when the legal issue resolved thereby is of fundamental significance not only for making a ruling for the specific case (in an individual situation), but also from the perspective of the decision-making activities of courts in general (for their court practice), or if it includes the resolution of a legal issue that is in conflict with material law.

The fact that, in the sense of the cited provisions, the admissibility of the appeal is linked with the conclusion on the fundamental juristic significance of the ruling from the legal perspective, it also becomes apparent that the appeal review is being opened for the purpose of judging legal issues (whether at the procedural level or in the area of material law). Other issues (specifically the evaluation of the accuracy or completeness of actual findings) do not establish a basis for the admissibility of the appeal. A qualified reason for appeal, by means of which the appeal can be justified, is therefore fundamentally a reason as provided by Section 241a Paragraph 2b) of the Civil Procedure Code, by means of which it can be claimed that the judgment was based on an incorrect legal evaluation of the case.

An incorrect legal evaluation of the case pursuant to Section 241a Paragraph 2b) of the Civil Procedure Code is an error on the part of the court when applying the law to the determined actual status, i.e., a situation whereby the actual status was judged according to a different legal regulation than should have been used, or, if the proper, designated legal regulation was determined but the court interpreted it incorrectly. An incorrect legal evaluation of the case is therefore a justified reason for an appeal only if the appealed ruling is based on this evaluation, or, in other words, if it was decisive for the judgment made by the court hearing the case.

As pursuant to the provisions of the first sentence of Section 242 Paragraph 3 of the Civil Procedure Code, the court hearing the appeal is bound to uphold the provisions for the reason for appeal, the only relevant issues (of those that are used as the basis for the appealed judgment) for determining whether the decision made by the appellate court has significance from the legal perspective or not , are those that the appellant has challenged or of which the appellant questioned the resolution of in the appeal. The question of whether the appealed judgment has fundamental legal significance is resolved by the court hearing the appeal as a preliminary issue. The admissibility of the appeal is thus not established solely on the basis of the appellant's claims that the decision made by the appellate court has fundamental legal significance but only on the positive conclusion of the court hearing the appeal that this is truly the case.

An appeal in this case is not admissible.

According to the provisions of Section 237 Paragraph 1c) of the Civil Procedure Code, the admissibility of an appeal cannot be based on resolving the appellant's objections regarding the fact that the Plaintiff's claims cannot be proven as far as what the actual nature and scope of the administrator Ing. M.H.'s authority was, the appellant's objection that additional proof was not submitted regarding the existence of a competitive relationship between the Plaintiff and Defendant No. 1, and the appellant's objection that Defendant No. 2 did not act in conflict with the ethics of competition. The objections submitted present the reason for appeal, stating that the ruling was based on actual determination, which for the most part, according to the contents of the records, do not provide significant support within the evidence that was provided, i.e., the reason for appeal is based on Section 241a Paragraph 3 of the Civil Procedure Code, which can however be applied only if the appeal is admissible in accordance with Section 237 Paragraphs 1a) and 1b) of the Civil Procedure

Code.

In the same manner, according to the second sentence of Section 242 Paragraph 3 of the Civil Procedure Code, the appellant's objection that the justification presented in the appellate court's ruling is in logical conflict cannot hold up, as the specified reason for the appeal states a different deficiency in the proceedings in accordance with the provisions of Section 241a Paragraph 2a) of the Civil Procedure Code, which is something the court hearing the appeal takes into consideration only if the appeal is admissible.

The appellant views the issue of fundamental legal significance as being founded in the evaluation of the question of whether it is in a competitive relationship with the Plaintiff - if its behavior, consisting of the use of the domain, specifically in the situation whereby it did not know of the alleged overstepping of authority of Ing. M.H. during the transfer of the domain, and acted in good faith believing that the transfer was executed legally, can be characterized as acting in conflict with the ethics of competition. The appellant views the same significance in the incorrect conclusion on mutual interdependence between Verdict Section I and II of the appealed ruling and the incorrect application of Section 566 and Section 66 of the Commercial Code in evaluating the mandator/mandatary relationship between the Plaintiff and Ing. M.H.

The Supreme Court fully agreed with the legal conclusion expressed in the justification for the appellate court's ruling, both from the perspective of the substance of the unfair competitive behavior of the defendants as well as the fact, and this specifically in the conclusion, that the Plaintiff is in a competitive relationship with the appellant. A competitive relationship must be interpreted taking the term "competitor" into consideration at a very broad level, as in a competitive relationship there are not only direct competitors providing the same services but also all other parties, who might even be non-commercial entities, who are active in similar connected, or mutually interchangeable fields or business activities (refer to "Commercial Code - Commentary", I. Štenglová, S. Plíva, M. Tomsa, et al., C.H. Beck, 9th edition 2004, pages 125-126). Direct competitors that mutually perform against each other also include those that participate in the fields of manufacturing or the provision of services that are mutually interchangeable. Competitors are thus all amongst whom there is an economic conflict on the market on the basis of the objective nature of their products or services. It is therefore possible to also characterize competitors as those entities amongst whom, due to the unfair activities of one of them, a direct competitive conflict never occurs (refer to "Law of Unfair Competition", Petr Hajn, 1st edition, Masaryk University, Brno 1994, pages 18-19). For this reason, the appellate court did not evaluate this issue that is in conflict with material law.

For the purposes of evaluating the case in question, the appellate court applied the general provisions on unfair competition (Section 44 of the Commercial Code). Among other things, this legislation states that in order for these conditions to be met, the behavior involved must be in conflict with the ethics of competition even though the legislation itself does not define these ethics. With regard to the judiciary documentation published as of this time, it can be construed that these ethics are not a closed normative system. They are more of a measure of the ethical evaluation of specific situations and their conformance with generally acknowledged rules for proper and honest behavior. It is therefore necessary to evaluate a conflict between behavior and ethics individually in each case, while taking into consideration the specific circumstances surrounding the behavior of the parties during the period in question and their positions at that time. If, in this specific matter, the appellate court reached the legal conclusion that the described behavior of Defendant No. 2, consisting of the unauthorized use of the domain established by the Plaintiff, was in conflict with the ethics of competition, whereby it justified in detail what the impact thereof could be and the possible damage to the Plaintiff's position on the market, as well as the competitive advantage acquired by Defendant No. 2, which was described in legal theory as "boarding a moving train", then this legal opinion cannot be criticized for being unverifiable or even that it was in conflict with material law. The appellant's

objection that it was acting in good faith is not of legal relevance, as, at the time the appellate court made its ruling, the decisive state was ongoing (refer to Section 154 Paragraph 1 of the Civil Procedure Code) and thus good faith could only be considered for a certain, limited period of time at the time the domain was being transferred and the period of time immediately following the transfer. What is fundamental however, is that the Commercial Code, in the provisions that address unfair competition (refer to Section 44 et seq. of the Commercial Code), i.e., the provisions that establish what unfair competitive behavior is, omit the element of the expression of will (culpability, whether intentional or resulting from carelessness, thus establishing the possibility of vindication/exculpation), but rather base the violator's liability on objective principles. For the specified reasons, the appellant's objections cannot hold up.

The court hearing the appeal did not conclude that the judgment passed by the appellate court was of fundamental legal significance, even from the perspective of other objections made by the appellant, as, at the time these issues were resolved by the appellate court, it did not determine any conflict with material law or any other circumstances whereby the appealed judgment would be legally significant. If, as compared to the court of first instance, the appellate court evaluated the relationship between the Plaintiff and Ing. M.H. according to the provisions of Section 566 and Section 66 of the Commercial Code as a relationship similar to that ensuing from a mandate contract and lasting only for the period of time that Ing. M.H. was a member of the Plaintiff's Board of Directors, its conclusion as far as results are concerned is consistent, as, according to Section 567 Paragraph 2 of the Commercial Code and according to Section 725 of the Civil Code, the obligation of a person acting under a mandate (or order) requires them to act in conformance with the mandator's (ordering party's) interests. The conclusion reached by the appellate court regarding the consequences of Ing. M.H.'s behavior towards the benefit of the appellant in relation to resolving the decisive issue of whether the legal tasks performed for the purpose of transferring the domain had the anticipated legal effects is therefor not in conflict with material law. The objection on the lack of connectivity of both opinions of the appellate course in the case in question is irrelevant. The appellate court unanimously presents the views that led it to expressing its conclusion on the obligation of Defendant No. 1 to register the Plaintiff as the owner of the domain in question. CZ.NIC, z.s.p.o., as the legal successor to EUNET Czechia, s.r.o. has, since 1998, been the sole administrator of the Czech nation domain, and the subject of its business activities is to ensure the registration of second level domains under the first level domain of "cz" (refer to Radka Pelikánová, Karel Čermák, Jr., "The Legal Aspects of Domain Names", Linde Praha, a.s., 2000, pages 190 and 193). If, therefore, Defendant No. 1 originally registered the domain properly for the Plaintiff, then subsequently illegally reregistered the transfer of the domain from the Plaintiff to Defendant No. 2, the Plaintiff cannot exercise any other rights against Defendant No. 1 to correct the illegal status, i.e., the renewal of its ownership rights to the domain in question. If, at the same time, Defendant No. 2 was assigned the obligation of refraining from using the "systemy.cz" domain, then the Plaintiff was awarded its rights in accordance with Section 53 of the Commercial Code. Assignment of an obligation solely to Defendant No.1 would result in the non-provision of legal protection against the direct disturber - the current user of the domain. However, it is of primary importance to evaluate the interconnection of the claims made individually against each of the defendants with regard to the different nature of these claims. Registration of the domain is a one-time action, which removes the illegal status and is of a restorative nature, but it is not generally preventive in nature. It is therefore appropriate to also decide on the right to delaying measures, which are generally targeted at the future and that are intended not only to prevent the continuation of the illegal condition, i.e., the use of the domain, but also to avoid the repetition of the illegal behavior that was the cause thereof. As far as this is concerned, the appellate court cannot be accused of any errors, and thus even these objections filed by the appellant are not admissible.

The issues challenged by the appeal are not of fundamental legal significance for general court practice as pertains to the challenged decision, as the resolution of the specifics of the case as

challenged by the appellant is indivisibly linked to the determination of the specific actual status, thus does not have the necessary judiciary overlap, and therefore the ruling of the appellate court does not introduce a far-reaching general precedent as pertains to the appellant's claim.

The appellant specifically states that it is challenging the entire judgment passed by the appellate court, i.e., up through and including the courts opinion on compensation of expenses for the proceedings. As far as this issue is concerned, the admissibility of the appeal cannot be deduced from the provisions of Sections 237 through 239 of the Civil Procedure Code because, in the specified section, an appeal pursuant to Section 243b Paragraph 5 and Section 218 Point c) of the Civil Procedure Code was denied (compare to the decision published under reference no. 4/2003 of the Collection of Court Rulings and Opinions).

From the conclusions as specified, the final judgment of the appeal is that it is not admissible. The Supreme Court therefore did not even order proceedings (pursuant to the first sentence of Section 243a Paragraph 1 of the Civil Procedure Code) and denies the appeal (pursuant to the first sentence of Section 243 Paragraph 5 of the Civil Procedure Code).

The opinion on the compensation of expenses for the appeal proceedings are justified on the basis of the provisions of the first sentence of Section 243 Paragraph 5, Section 224 Paragraph 1, and Section 142 Paragraph 1 of the Civil Procedure Code. As, from the procedural perspective, Defendant No. 2 caused the court hearing the appeal to deny the appeal, the Plaintiff acquired the right to receive compensation for any expenses effectively outlaid for the appeal proceedings. The Plaintiff's expenses consist of the fees charged by its representing attorney in the amount of CZK 1,550.00 pursuant to Section 8 Paragraph b), Section 14 Paragraph 1, Section 15, Section 16 Paragraph 1, and Section 18 Paragraph 1 of Decree No. 484/2000 Coll., as amended and supplemented, and a flat fee of CZK 75.00 for the execution on one legal service (opinion on the appeal) pursuant to Section 13 Paragraph 3 of Decree No. 177/1996 Coll., as amended by later legislation).

Instructions: No corrective measures are applicable against this ruling.

If the responsible party does not voluntarily fulfill its obligations as assigned by an enforceable ruling, the justified party has the right to request an enforceable writ of execution.

With the exception of the CZ.NIC association, all participants of the proceedings are identified solely by the first letters of their surnames or trade names. Except for information that allows for the identification of the participants to the proceedings or other entities, there were only minimal modifications to the text of the decision. Any relation between the abbreviations or representative symbols used and the people or domain names actually using such abbreviations or representative symbols for purposes of identification is purely coincidental.

When studying this ruling, it is necessary to bear in mind the fact that it contains not only the court's verdict itself and the justification therefor, but also a recapitulation of the respective claims made by the individual parties, whereby the court did not have to take into account some of these claims (i.e., when issuing a preliminary ruling) and these claims thus represent only the legal opinion of the party in question and not in any way the court's conclusions. The court's ruling cannot be automatically applied to other cases (even if their merits are similar) and the CZ.NIC association recommends that each individual case be consulted with internet domain experts and lawyers.