JUDGEMENT

In the business case between NUTRICIA DEVA, a. s., the plaintiff, and the defendant: No 1. Mr. Ota Hájek, and No 2. CZ.NIC, concerning the protection of corporate name rights, the Regional Court in Hradec Králové decided on 29.06.2006 as follows:

I. The action to compel the defendant No. 1 to refrain from using the second-level domain names "nutriciadeva" and "nutricia-deva" registered under the top-level domain .cz and to correct detrimental situation by transferring the domain names to the plaintiff provided the plaintiff is entitled to receive compensation for any expenses incurred in relation to the registrations, is hereby dismissed.

II. The action to compel the defendant No. 2 to transfer the second-level domain names "nutriciadeva" and "nutricia-deva" registered under the top-level domain .cz to the plaintiff and to prevent any disposal of them from the moment of their transfer to the plaintiff immediately after the decision becomes final and conclusive, is hereby dismissed.

III. The plaintiff shall be bound to pay the sum of CZK 7,250 for the costs of the proceedings and CZK 1,762 for the cash expenses of the representative, to the defendant No. 1, directly to the representative of the defendant No. 1, within three days after this judgement becomes effective; both sums are subject to VAT of 19%.

IV. The plaintiff shall be bound to pay the sum of CZK 6,425 for the costs of the proceedings and CZK 1,346 for the cash expenses of the representative, to the defendant No. 2, directly to the representative of the defendant No. 2, within three days after this judgement becomes effective; both sums are subject to VAT of 19%.

The plaintiff claimed that the court imposes the obligations specified in section I and II of the statement on the defendant No. 1 and the defendant No. 2, respectively, upon the grounds that the plaintiff pursues business activities under the corporate name of NUTRICIA DEVA registered on 02.04.2004; the plaintiff entered into a contract on the provision of computer network and computer equipment operation, functionality and maintenance of software etc. with the defendant No. 1 on 30.06.1999. The defendant No. 1 pursues business activities as an individual and he is the owner of the respective domain names; the defendant No. 2 is the registrar of domain names and enabled the defendant No. 1 to register the names. The defendant No. 1 makes unauthorized use of the corporate name of the plaintiff, since the defendant No. 1 has registered the respective domain names, which infringes the rights of the plaintiff to the corporate name because the corporate name belongs solely to the relevant entrepreneur and no other person is entitled to use it. This obviously applies also to the Internet environment. Activities of the defendant No. 1 prevent the plaintiff from presenting his company under its corporate name because it is not possible to register two identical domain names. The plaintiff is prevented from opening his own websites and to present his business. The plaintiff's company had been registered in the Commercial Register before the domain names of the defendant No. 1 were registered. The defendant No. 2 does not provide his services ensuring sufficient protection of the rights of third persons since the defendant No. 2 does not check whether the applicant is or is not entitled to use the names. The plaintiff asked the defendant No. 1 to remedy the situation, but the defendant No. 1 offered to sell the domain names for the sum of CZK 100,000 and continued in his activities. The defendant claimed that the activities of the defendant No. 1 are in conflict with good morals and business customs and they represent an abuse of the corporate name and unacceptable interference with the exclusive rights of the plaintiff.

The defendant No. 1 defended himself against the action in a comprehensive statement on the domain names, the options to register under international domains such as "biz", "com", "org", "net" etc.; the defendant No. 1 also pointed out that the plaintiff has registered the DEVA trademark but not NUTRICIA DEVA, but there is a presentation of somebody else on the "deva.com" websites; and

regarding some other findings and comparison of the use of various domain names on the Internet. As for the merits of the case, the defendant No. 1 has not admitted that he would pursue any illegal activities; he claims he has only registered the names but does not use them; he provides services to the plaintiff because he provided for a re-direction, so that when either of the given domain names is typed, the official websites of the plaintiff open automatically. The plaintiff uses the domain names of the defendant No. 1 and non-specialists may not understand that any re-direction takes place. The defendant No. 1 does not prevent the plaintiff in any manner to act under his corporate name; on the contrary, he enables him to do so without any restrictions. The defendant No. 1 also stated that he had registered the domain names (12.12.2003) before the corporate name of the plaintiff in its current form was registered in the Commercial Register (02.04.2004), but even before, i.e. on 16.01.2004, he transferred the domain names to the plaintiff. At the beginning of 2005 the defendant No. 1 found out that the plaintiff apparently does not need the websites because its expiry period has lapsed and the plaintiff in fact left the domain names for further use. As the author, the defendant No. 1 re-registered them for himself and was not aware of any illegal activities because no speculation took place; the names originally belonged to him and when the names were released he got them back and paid for them to the defendant No. 2 on 27.01.2005. The plaintiff paid no attention to the situation until 06.05.2005 when he asked the defendant No. 1 to cease to use the domain names claiming that the defendant No. 1 breaches the law. The defendant No. 1 offered amicable solution, he did not insist on his original financial requirements and asked the plaintiff to adopt a solution by 18.09.2005 claiming that he would cease to provide the services provided up to that moment. The plaintiff did not accept any agreement and filed the action. The defendant claims that his activities which in fact protected the plaintiff's interests cannot be in conflict with good morals since the plaintiff left the domain names for further use and services for their use were provided free of charge. He applied for the action to be dismissed.

The defendant No. 2 described in detail his role as an administrator of the top-level domains, i.e. "cz", the rules for and the manner of registration etc. and provided the data related to the registration of the domain names made by the defendant No. 1, then by the plaintiff and again by the defendant No. 1, and presented extracts from the register. He applied for the action, if filed against him, to be dismissed.

The standing of both parties to the proceedings was proven uncontested in the course of the evidence proceedings and between the plaintiff and the defendant No. 1, as well as entering into and performing the contract as of 30.06.1999, and the fact that the defendant No. 1 is the owner of the respective domain names.

As of the date of the hearing of the case and as of the date of the decision, the court checked on the websites that on both addresses there are the home websites of the plaintiff located. The court also checked that according to the full extract from the Commercial Register of the plaintiff, Section B, File 1170 of the present court, the plaintiff has been registered under the current corporate name since 02.04.2004.

It has also been proven undisputable that the defendant No. 1 transferred the domain names to the plaintiff at the beginning of 2004.

The plaintiff added that the defendant No. 1 was supposed to provide for the plaintiff pursuant to the contract entered into with the defendant No. 1 on 30.06.1999 which terminated upon revocation of the contract by the plaintiff on 23.02.2004. The obligation to provide for the registration of the domain names was incorporated in Article I of the contract.

From the contents of the contract the court ascertained that the defendant No. 1 undertook to provide for the operation of the computer network, the functionality of the programme software and its maintenance.

The defendant No. 1 was examined in a participant examination regarding the statement. The defendant No. 1 stated that he cooperated with the plaintiff in the long term upon contracts at least from 1996 similar to the contract from 1999, i.e. activities in or directed on the business of the plaintiff. The defendant No. 1 never entered into any contracts or acted for the plaintiff; the plaintiff never granted any power of attorney to the defendant No. 1. The domain names were not registered upon the plaintiff's request; they were registered on his own initiative after he became aware that the plaintiff intends to buy the NUTRICIA company. He expected a change in the corporate name, considered the versions of corporate names following the merger and therefore he alone registered the domain names because no person was charged with this issue at the plaintiff's business. The defendant No.1 then transferred the domain names to the plaintiff because the corporate name was actually changed and the plaintiff could then use the domain names in accordance with the corporate name; after the change, the plaintiff found out that the defendant No. 1 had the domain names registered and was interested in the names. The defendant No. 1 was contacted by Mr. M. and they agreed on the transfer; the defendant No. 1 provided the domain names to the plaintiff free of charge except for the registration fee. The defendant No. 1 looks after the expiry dates of domain names, and in this context he accidentally found out that the domain names that he had transferred to the plaintiff, were available; he was surprised and thought that the plaintiff was not interested in them anymore or ceased to use them for some reason or that an administrative error happened. He registered the names , he pointed out that any available domain names may be registered by anybody worldwide in few seconds, and he expected the same course of action as after the first registration. In a way he protected the plaintiff's interests without determining for how long the names had been available. The plaintiff however contacted him in about 3 months in a notice asking for an immediate transfer of the names free of charge under the threat of an action, and the plaintiff insisted on that. The defendant No. 1 added that he never placed any presentation of his own on the websites, he is not the author or administrator of the websites, he never asked the plaintiff to remove his presentation; on the contrary, he made the re-direction of the domains to the domain owned by the plaintiff, i.e. "deva.cz". The defendant No. 1 has no reason to cause harm to the plaintiff; his activities are for the benefit of the plaintiff; taking into account the plaintiff's approach, however, the defendant No. 1 is not willing to make the domain names available to the plaintiff free of charge but he offers to sell the domains to the plaintiff as he has always suggested. The defendant No. 1 admitted that he could prevent the access to the "deva.cz" websites upon using some of his domain names.

The plaintiff insists on his allegations that the registration of the domain names was part of the contractual obligations of the defendant No. 1 and requested evidence upon a participant examination of Mr. M, the Chairman of the Board of Directors of the plaintiff. The court refused to hear the evidence because the allegation is in conflict with the contractual arrangement - see above - and regarding the interpretation of the content and accuracy of the bilateral manifestation of their will, the court emphasizes the first sentence of the decision of the Supreme Court, File No. 26 Cdo 404/2005 I, with reference to 33 Cdo 512/2000 I, quote: "If a legal act is recorded in writing, the accuracy of the manifestation of will is based on the content of the deed in which it is recorded; it is not sufficient that for the parties to the contract the subject-matter of the contract is clear if it is not clear also from the text of the deed. The accuracy of a written manifestation of will is an objective category and such manifestation of will should not cast justified doubts in third persons concerning its content." The court also declared that upon the full extract of the plaintiff from the Commercial Register, Mr. M was not the plaintiff's representative at the time the contract was entered into.

The court pointed out that the judgement of the High Court in Prague from 10.08.2004, referred to by the plaintiff, as well as other decisions of superior courts generally published on the websites of the defendant No. 2, illustrate the jurisdiction regarding domain names with aspects of unfair competition and protection of industrial rights including the aspect of time, i.e. that in all cases decided by the given courts the defendant that infringed the rights of the plaintiff acted against the rights that the

plaintiff had already had, and the court invited the participants to settle the case amicably pursuant to sec. 99 of the Civil Procedure Code.

The participants failed to file a principal protest of the plaintiff for amicable solution or settlement in the provided period.

Upon the produced evidence the court concludes that the defendant No. 1 is the owner of domain names "nutriciadeva.cz" and "nutricia-deva.cz" and that the defendant No. 1 enables the plaintiff's presentation by re-directing them to the plaintiff's websites "deva.cz". No information of the defendant No. 1 is presented upon entering the domain names; the defendant No. 1 neither presents his business thereon nor makes another profit from the ownership. The fact that the plaintiff was in a contractual relationship with the defendant No. 1 was without prejudice to the fact that the defendant No. 1 registered the domain names on 12.12.2003 and then at the beginning of 2005, because its registration for the plaintiff was not included in the obligations of the defendant No. 1 under the contract related to the provision of the plaintiff's hardware operation and software operation and maintenance, but no dealings for the plaintiff with other entities were included in the obligations, e.g. with the defendant No. 2. The court deems it proven that the plaintiff although he was the owner of the domain names from 16.01.2004 failed to take care of his right and caused that the domain names again became available for further use. Upon the new registration and "re-directing" of the domain names the defendant No. 1 again made the plaintiff's web presentation possible and has been doing so ever since.

The defendant No. 2 is merely the registrar of domain names without any rights to take decisions or perform controls.

Upon the merits of the case determined in the aforementioned manner the court concludes as follows:

The plaintiff asked the court to protect his rights regarding the corporate name pursuant to sec. 12 of the Commercial Code; he also mentioned provisions of sec. 19b of the Civil Code. Provisions of sec. 19b of the Civil Code cannot be applied in the given case since both the plaintiff and the defendant No. 1 are entrepreneurs. Pursuant to sec. 12(1) of the Commercial Code, anybody whose rights have been infringed by unlawful use of his corporate name is entitled to protection.

A violation of the corporate name rights, i.e. unlawful use of the corporate name, may be deemed situation when the wrongdoer uses identical or interchangeable corporate name in business transactions and publicly to the detriment of the entitled person, unintentionally or intentionally, see also sec. 44 and 47 of the quoted Code, and the entitled person is affected thereby, i.e. discredited. In the given case, however, the defendant No. 1 does not use the plaintiff's corporate name in business transactions or in relation to the public to the detriment of the plaintiff; on the contrary, the defendant No. 1 provides the plaintiff with unsolicited services by enabling the presentation of his company and business activities on the websites of the domains that he owns, while the plaintiff although he owned the domain names did not take care of the protection of his rights and left the domain names for further use. The activities of the defendant No. 1 are free of any features of unlawful use of corporate names as provided for in sec. 12(1) of the quoted Code, and such activities would not negatively affect the plaintiff's rights. In the available jurisdiction there are certain cases when the rights in terms of domain name registrations were infringed by a speculator in order to obtain material benefit, or by a competitor in terms of activities of unfair competition, and generally this happened to the detriment of certain already obtained rights. This, however, is not the case. In order to arrange for the relationship between the participants in a reasonable manner they should reach an agreement under which an unsolicited service would turn into a requested one or under which the plaintiff would gain the rights of the domain names owner and maintain such rights.

The court concludes that the defendant No. 1 has not committed the act claimed by the plaintiff, i.e. unlawful use of the plaintiff's corporate name, and the action against the defendant No. 1 is hereby dismissed.

Depending on the dismissive statement under point I, the action against the defendant No. 2 was also dismissed.

The decision on the compensation for the costs of the proceedings was taken pursuant to sec. 142, 149 and sec. 137(3) of the Civil Procedure Code, and the court adjudicated the compensation of costs of the proceedings to both defendants who succeeded in the case as well as of the evidenced cash expenses of their representatives, and the payment of CZK 6,200 to each defendant pursuant to Regulation No. 484/2000 Coll., and 6 lump-sum payments and 3 lump-sum payments of CZK 75 to the defendant No. 1 and the defendant No. 2, respectively, and the payment of CZK 600 to the defendant No. 1 for the loss of time, all pursuant to Regulation No. 177/1996 Coll., in total CZK 7,250 and CZK 6,425 to the defendant No. 1 and the defendant No. 2, respectively, and CZK 1,762 and CZK 1,346 to the defendant No. 1 and the defendant No. 2, respectively, for evidenced cash expenses. Both defendants are entitled to VAT of 19% regarding the awarded compensations and cash expenses since both representatives evidenced that they are taxpayers.

When examining the decision it should be noted that the decision comprises the statement of the court and its reasoning as well as the summary of the statement of each party, and the court might have omitted some of the allegations in the decision (e.g. in terms of preliminary rulings) and such allegations are therefore deemed the legal opinion of the respective party, not a conclusion of the court.

The judicial decision may not automatically be applied to other cases (even if similar in the merits of the case) and the CZ.NIC association recommends consulting the specific case with experts in domain names and with lawyers.