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, in response to the appeal of the plaintiff against the judgement of the Regional Court in Hradec Králové from 29 June 2006, the High Court in Praha decided on 04.05.2007 as follows:

- The judgement of the court of first instance is hereby altered and both defendants are obliged to transfer the domain name nutriciadeva.cz to the plaintiff within 15 days after the judgement becomes effective provided the defendant No. 1 is entitled to receive compensation for the expenses incurred in relation to the registration of the given name; otherwise the dismissing statements regarding the duty of the defendant No. 1 to refrain from using domain names nutriciadeva.cz and nutricia-deva.cz, the duty of the defendant No. 2 to prevent the defendant No. 2 from disposing of domain names nutriciadeva.cz and nutricia-deva.cz and the duty of both defendants to transfer domain name nutricia-deva.cz to the plaintiff, are hereby confirmed.
- The plaintiff shall be bound to pay the sum of CZK 9,051.30 for the costs of the proceedings and CZK 9,627.30 for the costs of the appellate proceedings to the defendant No. 1, to his legal representative, within three days after this judgement becomes effective.
- The plaintiff shall be bound to pay the sum of CZK 8,313 for the costs of the proceedings and CZK 3,867,50 for the costs of the appellate proceedings to the defendant No. 2, to his legal representative, within three days after this judgement becomes effective.

In the action – in the wording that incorporates the change admitted by the court – the plaintiff asked for a judgement which would impose an obligation on the defendant No. 1 to refrain from using second-level domain names "nutriciadeva" and "nutricia-deva" registered under the top-level domain "cz", and an obligation 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 their registrations; and which would impose an obligation on the defendant No. 2 to prevent any disposal of the domain names until the moment of their transfer to the plaintiff, and to transfer them to the plaintiff. To justify the claims to protect the corporate name, the plaintiff stated that it had been registered in the Commercial Register since 01.01.1995 and its objects of business include, among others, the production of foodstuffs and drinks; it has pursued business activities under the current corporate name since 02.04.2004. Under the contract from 30.06.1999, the defendant No. 1 provided the plaintiff with services related to his hardware and software without any links to the corporate name of the plaintiff; he registered domain names nutriciadeva and nutricia-deva in the national domain .cz via the defendant No. 2 as the registrar. According to the plaintiff, the defendant No. 1 unlawfully uses the plaintiff's corporate name which the plaintiff is surely entitled to use in the Internet environment. The activities of the defendants prevent the plaintiff from exercising his rights under the provisions in the Commercial Code regulating corporate names; the plaintiff cannot present his company under his corporate name and he is prevented from being able to open his own websites and presenting his business and products there at his own discretion. The defendant No. 1 did not remedy the situation regardless of a notice for remedy and offered to transfer the domain names for the sum of CZK 100,000 per name, and continued in his activities. For the plaintiff, this represents an unacceptable abuse of his corporate name and unacceptable interference with the exclusive rights of the plaintiff related to his corporate name. Since there is no legal reason for the defendant No. 1 to register and use a domain name identical to the plaintiff's corporate name, the plaintiff applied for the claims stated in the action because the defendant No. 1 failed to satisfy the claims.

The defendant No. 1 suggested that the action be dismissed because he did not infringe any of the plaintiff's rights related to the corporate name and claimed that any corporate name does not in

itself mean that its owner is entitled to the relevant domain name, and that the registered versions of the domain names are not identical with the plaintiff's corporate name, and there is nothing preventing the plaintiff to register the domains under other national or international domains (e.g. "org", "biz" etc.). The defendant No. 1 had registered the domain names for the first time before the plaintiff adopted the current version of his corporate name, but still he transferred the domain names to the plaintiff voluntarily; the plaintiff however obviously did not need the domain names because he failed to pay the maintenance fee and the registration terminated. The domain names left in such manner and available for registration were registered again by the defendant No. 1 in January 2005, and the plaintiff asked for their transfer as late as in May 2005 claiming that it is illegal for the defendant No. 1 to register and use the names. The plaintiff has not stated in the action, as declared by the defendant No. 1, that there is no detriment to the plaintiff because upon typing the domain names, the visitors are re-directed to the websites of the plaintiff "deva.cz"; the defendant No. 1 thus provides a service to the plaintiff free of charge by providing his presentation also on the given domains. Finally, he proposed that the action be dismissed, though he admitted an option that an agreement be entered into with the plaintiff on the transfer of the names or further provision of services.

The defendant No. 2 in his statement described his standing as a domain registrar in terms of national domain .cz, and the principles related to the domain name registration process, and declared that if the action against the defendant No. 1 is admitted, he will conform to the decision and carry out the changes in registration; he however pointed out the inaccuracy of the then wording of the statement of the claim. The defendant No. 2 also stated that both the domain names were first registered by the defendant No. 1 on 12.12.2003 and then they were transferred to the plaintiff on 27.01.2004 (at that time under the corporate name of DEVA, a. s.); the registration was however terminated on 26.01.2005 due to the failure of the plaintiff to pay the fee to extend the registration for another period and the defendant No. 1 re-registered the names on 27.01.2005.

The court of first instance fully dismissed the action in the aforementioned judgement and imposed an obligation on the plaintiff to pay CZK 7,250 and CZK 1,762 with VAT to the defendant No. 1 and CZK 6,425 and CZK 1,348 with VAT to the defendant No. 2 as a compensation for the costs of the proceedings. In the reasoning of the judgement the court described the allegations of the plaintiff and the statements of the defendants, it presented its findings determined upon the produced evidence which are under further examination from factual and legal point of view. The court based its decision upon the fact that the defendant No. 1 is the holder of domain names nutriciadeva.cz and nutricia-deva.cz and that the defendant No. 1 enables that the plaintiff puts its presentation there by re-directing them to the plaintiff's website deva.cz. There is no reference to the defendant No. 1 on the website and therefore there is no profit for the defendant No. 1. The fact that there was a contractual relationship between the plaintiff and the defendant No. 1 is irrelevant in terms of the activities of both participants because the contract did not govern any potential registration of domain names. The court considered it evidenced that although the plaintiff was the holder of the domain names from 16.01.2004 (after the defendant No. 1 transferred them to him), the plaintiff did not take care of his rights and as a result the domain names became available for further use. By re-registering both the names and re-directing the websites the defendant No. 1 again enabled the web presentation of the plaintiff to be presented, and has been doing so ever since. The court stated that the defendant No. 2 serves solely as a registrar without any rights to control or decide on the names that are to be registered. It was emphasized that the plaintiff required protection pursuant to sec. 12 of the Commercial Code as a corporate name owner; he also mentioned the provisions of sec. 19b of the Civil Code which however does not apply to the relationships of entrepreneurs. Pursuant to sec. 12 of the Commercial Code the court concluded that an interference with corporate rights means that the wrongdoer uses identical or interchangeable corporate name in business transactions and publicly to the detriment of the entitled person, unintentionally or intentionally, and the entitled person is affected thereby, i.e. discredited. This, however, is not the case; the defendant No. 1 does not use the

designation of the plaintiff to the plaintiff's detriment; on the contrary, he provides the plaintiff with unsolicited services by enabling the presentation of his company and business activities upon re-directing to the websites of the domains that he owns, because although the plaintiff owned the domain names he did not take care of his rights and left the domain names available for further use. The activities of the defendant No. 1 are free of any features of unlawful use of the corporate name as provided for in sec. 12(1) of the quoted Code, and the court stated that such activities have no negative impact on the plaintiff's rights. The defendant No. 1 cannot be deemed a speculator acting to the detriment of the entitled persons' rights that he had gained before. As stated by the court in the summary, in order to arrange for the relationship between the participants in a reasonable manner they should reach an agreement. Upon the aforementioned grounds the court of first instance dismissed the action and stated reasons concerning the costs of the proceedings and the sum of the compensation considering the result of the proceedings, the amendment to Regulation No. 484/2000 Coll., and the attorney's fees.

The plaintiff challenged the judgement fully in his appeal and claimed that the court of first instance examined the case incorrectly since it did not considered the fact that the right of the plaintiff to his corporate name is an absolute right, and all other entities should refrain from interfering with this right. The right and the duty of entrepreneurs to act under their corporate name should apply also to the Internet, according to the appellant. The conclusion of the court that the defendant No. 1 does not unlawfully interfere with the plaintiff's rights is not appropriate; although visitors are re-directed to the websites of the plaintiff, the defendant prevents the plaintiff from exercising his right to decide on the content of the website directly under the given domain names at his own discretion, not mentioning that the defendant No. 1 may terminate the re-directing any time. The appellant believes that the registration of the domain names itself infringed the rights concerning the plaintiff's corporate name; the defendant No. 1 was supposed to notify the plaintiff of the fact that the domain names became available for further use. The plaintiff referred to the current jurisdiction and emphasized that there is no relevant right for the defendant No. 1 to keep and use the domains, and that the defendant No. 1 claims that he is willing to transfer the domain names but only upon payment of a considerable sum of money. In the end he pointed out an inaccuracy in the statement of the court and proposed that the appellate court changes the challenged judgement so that his action with the proposed change is fully satisfied.

The defendant No. 1 in his statement on the appeal proposed that the judgement of the court of first instance the conclusions of which he deems correct be confirmed. The defendant No. 1 believes that the plaintiff argues incorrectly because the fact that the defendant No. 1 registered the domain names does not mean that he uses the corporate name; the defendant No. 1 does not act under the plaintiff's corporate name and the website that opens under both domain names is the website of the plaintiff. The defendant No. 1 does not prevent the plaintiff from presenting himself on the Internet, as pursued by the plaintiff on his domain deva.cz, and the defendant No. 1 extends the presentation to the relevant domain names by ensuring the re-directing service. The plaintiff's corporate name is NUTRICIA DEVA, a. s., and upon typing this address on the Internet, no website opens; when the corporate name is typed in the explorer bar, the visitors are presented with the plaintiff's website. In further discussion and using other arguments the defendant No. 1 claims that the appeal and the statement of claim are unjustified.

Pursuant to sec. 212 et seq. of the Civil Procedure Code, Act No. 99/1963 Coll., as amended, hereinafter the "CPC", the High Court in Praha as an appellate court re-examined the appealed judgement of the court of first instance in full extent and after the proceedings and re-examining of certain evidence it concluded that the appeal is, though only partially to a certain extent, justified.

First, it should be stated that according to the appellate court, the court of first instance based its decision upon factual examination in the required scope; none of the participants required that the

findings – only referred to herein to keep the text brief – be amended and also the appellate court fully accepted it and basedits decision upon it. In order to check the standing of the case and completeness of the findings the appellate court produced evidence upon reading the data from the extracts from the registrations of domain names nutriciadeva.cz and nutricia-deva.cz and the full extract of the plaintiff from the Commercial Register; the court checked the re-directing of the given domain names when those are typed as Internet addresses to the plaintiff's website deva.cz and determined that the findings correspond to the situation upon which the court of first instance based its decision, i.e. that both domain names have been held by the defendant No. 1 from 27.01.2005 and the plaintiff was registered under the corporate name of DEVA, a. s., to the Commercial Register on 01.01.1995; the change of the corporate name to the existing NUTRICIA DEVA, a. s., was registered on 02.04.2004, and that any potential visitor is re-directed to the deva.cz website in case either of the domain names is entered in the explorer bar.

The subject-matter of the dispute are the claims of the plaintiff to impose an obligation on the defendant No. 1 to refrain from using domain names nutriciadeva.cz and nutricia-deva.cz, an obligation on the defendant No. 2 to prevent any disposal of the names until the names have been transferred to the plaintiff and an obligation on both defendants to correct detrimental situation and transfer the domain names to the plaintiff. The plaintiff claimed the claims to protect the corporate name and the name of a legal entity. The court of first instance stated correctly that the plaintiff is an entrepreneur (sec. 2 of the Commercial Code) pursuing business activities under a corporate name (as defined in sec. 8 (1) of the Commercial Code) and that also the person interfering with the corporate name is an entrepreneur, and the plaintiff is entitled to the rights under special provisions for the protection of the corporate name pursuant to sec. 12 of the Commercial Code (see also sec. 1(2) of the Commercial Code) which prevails over the general provisions for the protection of the names of legal entities as described in sec. 19b of the Civil Code. If the court of first instance considered the plaintiff's claims as claims pursuant to sec. 12 of the Commercial Code, no deviation took place.

Pursuant to sec. 12 (1) of the Commercial Code (Act No. 513/1991 Coll., as amended, hereinafter the "CC"), any person whose corporate name was abused may claim that the unauthorized user refrains from such activities and corrects detrimental situation. This implies an absolute protection of corporate name – i.e. entrepreneurs may require protection against any unauthorized user and their rights are protected in relation to anybody, and the fact that the claims to refrain from unlawful acting and to correct detrimental situation are conditioned only by an objectively given standing – unauthorized use of a corporate name without it being relevant what are the reasons for such use or whether the activities were pursued intentionally or neglectfully. Therefore, there is disagreement regarding the manner in which the court of first instance interpreted the application of sec. 12(1) of the CC, if it made it dependent on the "damage" to the entitled person caused by the "wrongdoer" and the use of the corporate name "to the detriment" of the plaintiff, i.e. determining that to satisfy the claims, an unauthorized use of corporate name results in damage to the plaintiff. This conclusion however does not correspond to the legal conditions of the application of the given provision. In order to successfully apply the dilatory claim and the claim to correct detrimental situation pursuant to sec. 12(1) of the CC it is not necessary to determine whether the unauthorized user anyhow "damaged" the entitled person and whether the entitled person incurred any harm, material or immaterial.

Although we may agree with the defendant No. 1 claiming that the right to certain corporate name does not imply that the owner of a corporate name is entitled to an identical domain name on the Internet and that the defendant No. 1 does not anyhow prevent the plaintiff from registering domain nutriciadevaas.cz that corresponds to the full corporate name or to register the contentious domain names in other national or international domains, still the defendant No. 1 – by registering domain name nutriciadeva.cz (but – as explained below – by registering this name and not the name of nutricia-deva.cz) and upon the fact that visitors who type the name as an address are re-directed to the plaintiff's website deva.cz – uses the plaintiff's corporate name in an unauthorized manner. It is

crucial that potential domestic clients interested in the plaintiff's offer are likely to type "nutriciadeva.cz" as the most probable address and they will not try other national or international domains, and they will not consider other names such as nutriciadevaas.cz (the abbreviations determining the legal form of the company such as a. s., spol. s r. o., etc. are not usually included in the domains) or nutricia-deva.cz or any other amendments or additions such as e-, i- or hyphens in other various places in the name etc. As for the objections of the defendant No. 1 it may be stated that it is not important that the domain name is "nutriciadeva" and not NUTRICIA DEVA (i.e. the root of the plaintiff's corporate name) since this form of the domain name corresponds to the technical options of designations on the Internet. The conclusion therefore is that in the Internet conditions and environment the defendant No. 1 used the plaintiff's corporate name for the registration of the given domain name in the national domain .cz.

It is also crucial that there is no legal reason for the defendant No. 1 to use (register with the registrar) the plaintiff's corporate name as a domain name. The defendant No. 1, except of the fact that he had registered the plaintiff's corporate name with the defendant No. 2 as a domain name, does not have any rights to the plaintiff's corporate name, formally (e.g. as the wording of a registered trademark) or informally (e.g. not registered designation of goods or services). The completely unique and exceptional version of the plaintiff's corporate name, the re-directing to the plaintiff's website deva.cz, the previous business relationships of the defendant No. 1 towards the plaintiff and later an offer to transfer the name for consideration excludes the option that the corporate name was registered unintentionally as a domain name on 27.01.2005, and it also excludes the option that the registration was made in good faith – the first registration was made in good faith since the name was consequently voluntarily transferred to the plaintiff, but the second registration was not made in good faith since the defendant No. 1 requires a relatively high sum to be paid for the transfer. The court of first instance was right in emphasizing that the plaintiff neglected the transferred domain names; the plaintiff obviously failed to act in a due manner and the appellate court agreed in the acceptation of the plaintiff's proposal to impose a duty on the plaintiff to reimburse the defendant No. 1 for the costs of registration; on the other hand, the plaintiff's failure to act that resulted in the domain name being made available for further use does not mean that the plaintiff ceased to have the right to protect his corporate name in relation to the contentious domain name. The appellate court does not agree with an assessment made by the court of first instance related to the provision of "unsolicited service", i.e. the persons interested in the website of domain nutriciadeva.cz shall be re-directed (upon the will of the defendant No. 1) to the plaintiff's websites, and the appellate court does not agree with the findings and the conclusion reached by the court of first instance. First, it should be noted that the defendant No. 1 anytime may without any limitations cease to provide the "unsolicited service"; the re-direction means that visitors get used to the re-direction (and the plaintiff's websites) and a potential termination of the re-direction would affect the plaintiff more extensively than if the website was not active from the beginning. If the re-directing takes place, than the court agrees with the court of first instance only in the fact that the plaintiff incurs no harm (this conclusion was reflected in the assessment of the justification of the plaintiff's request towards the defendant No. 1 to refrain from using domain name nutriciadeva.cz and to make any disposal thereof impossible), but not in the fact that therefore no abuse of any version of the corporate name takes place. The defendant No. 1 makes use of the names already by the fact that he registered this version of the corporate name as a domain name as well as by enabling websites to open under the name (even if the websites were the ones of the plaintiff), but the plaintiff cannot decide on the use of the domain name himself. The defendant No. 1 decides what (what data, what pages and what content) will appear to potential clients after the name nutriciadeva.cz is typed to the explorer bar, i.e. after the plaintiff's corporate name in the form of the national domain .cz is typed to the explorer bar at the address (on the Internet) where the interested person and the client objectively expect such name and expect the websites of the plaintiff. The appellate court believes that the defendant No. 1 (who has no acceptable reason to register the

name nutriciadeva.cz for himself) unlawfully uses the plaintiff's corporate name and the plaintiff as an "affected" person is entitled to apply claims under the rights pursuant to sec. 12(1) of the CC.

The ownership of a corporate name does not authorize the owner to own several domains on the Internet that are more or less identical, partially or fully, with the corporate name as mentioned above. The appellate court has already judged several times (e.g. decision quoted in Horáček, Macek: Sbírka správních a soudních rozhodnutí ve věcech průmyslového vlastnictví, C.H.Beck 2007, page 237) that an average Internet user is a user familiar with the Internet environment and its operation and is aware of the importance of every letter, number and mark used in any address typed in the explorer bar. It is possible to create a number of domain names by adding various hyphens, letters (e-, i-), other prefixes, suffixes etc. to the corporate name, but the one that interferes with the corporate name rights is usually the domain name to be used by an average Internet user to find a presentation of an entrepreneur with the given corporate name. Such domain name is nutriciadeva.cz and not nutricia-deva.cz. Therefore, the appellate court concluded (taking into account the information above) that the defendant No. 1 makes unauthorized use of the plaintiff's corporate name (NUTRICIA DEVA, a. s.) on the Internet by using domain name nutiricadeva.cz. The decision of the court of first instance to dismiss the action to refrain from using, to prevent the disposal of and to transfer domain name nutricia-deva is therefore correct and pursuant to sec. 219 of the CPC it was confirmed by the appellate court which concluded that the use of that domain name (i.e. the use on the Internet) does not represent an unauthorized use of the plaintiff's corporate name. For completeness' sake we may add that the conclusion does not prevent imposing an obligation to transfer the given domain name or a similar one, but not based on the rights to the corporate name that is the subject-matter of the case.

Regardless of the conclusion that domain name nutriciadeva.cz is used in an unauthorized manner, the appellate court decided that the claimed dilatory claim and the claim to impose a duty on the defendant No. 2 to prevent any disposal of the domain name is not justified. The existing re-directing is arranged for in a long term and there is no harm to the plaintiff resulting from the re-directing itself; to protect the plaintiff's interests it is sufficient to provide for a re-registration of the domain name owner, which ' along with the duty imposed to the defendant No. 1 ' is unambiguous and prevents any delay and (also regardless of a transitional period, if any, for the disposition made by the defendant No. 1) is ensured upon the duty imposed on the defendant No. 2 to transfer the registration of the domain name without further action to the plaintiff within the period stipulated by the court. Therefore, there is no reason to impose a duty on the defendant No. 2 to prevent the defendant No. 1 from using the domain name until the domain has been transferred because such use cannot have any impact on the transfer of the name to the plaintiff. Upon the aforementioned reasons the appellate court concluded that pursuant to sec. 12(1) of the CC the plaintiff proved his entitlement to the protection of his corporate name, proved that the defendant No. 1 uses his corporate name in an unauthorized manner as domain name nutriciadeva.cz, and proved the detrimental situation resulting from such unauthorised use which may be corrected solely by transferring the contentious domain name to the plaintiff. In the statement of the claim, the plaintiff requested the aforementioned in relation to both defendants and the action in such extent should have been satisfied; therefore, pursuant to sec. 220(1) of the CPC the appellate court changed the dismissing statement of the court of first instance regarding the duty of the defendants to transfer the given name and satisfied the action; pursuant to sec. 219 of the CPC the statement of the judgement was otherwise confirmed as factually correct.

The costs of the proceedings in both instances were determined by the appellate court (see sec. 224(2) of the CPC) pursuant to sec. 224(1), 142(2) of the CPC and in accordance with the findings of the proceedings in which the plaintiff succeeded only with 1 of his claims against each defendant (one out of 4 claims; each domain name should be considered separately for this purpose) and the plaintiff is obliged to reimburse both defendants for a half of the costs of the proceedings incurred by them.

Pursuant to sec. 137 of the CPC and to Regulation No. 484/2000 Coll., Regulation No. 177/1996, the defendant No. 1 is entitled to compensation of CZK 9,051.30 for the proceedings before the court of first instance (one half of the total of 2x CZK 6,200 + 6x CZK 75 + loss of time CZK 600 + travel expenses 3x CZK 587,42 + 19% VAT) and CZK 9,627.30 for the appellate proceedings (one half of the total of 2x CZK 6,200 + 2x CZK 300 + loss of time CZK 1,200 + travel expenses CZK 1,980,32 + VAT), and pursuant to the aforementioned legislation the defendant No. 2 is entitled to compensation of CZK 8,313 for the proceedings before the court of first instance (one half of the total of 2x CZK 6,200 + 3x CZK 75 + travel expenses CZK 1,346.55 + VAT) and CZK 3,867.50 for the appellate proceedings (one half of the total of one half pursuant to sec. 18(1) of Regulation No. 484/2000 Coll. the fees of 2x CZK 6,200 + CZK 300 + VAT).

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.