PRELIMINARY MEASURE

(decision of the court of appeal on the appeal of the complainant against the ruling of the court of first instance - see Judicial verdict 2)

> The High Court in Prague decided on 31 January 2002 in the legal matter of the complainant **K.** against the accused**:** 1. **CZ.NIC** and 2. **M.** on the fulfilment of obligations from an agreement and protection against the activity of unfair competition, together with the proposal for the issue of a temporary measure, on the appeal of the complainant against the ruling of the Municipal Court in Prague of 27 August 2001, as follows: The ruling of the court of first instance is amended in that the first accused is obliged to refrain from carrying out changes in the registration of the domain "xyz.cz", apart from its transfer from the second accused to the complainant, the second accused is then obliged to refrain from the provision of information about himself and provided services on Internet pages with the use of the domain "xyz.cz". In the remainder the negative finding of the ruling of the court of first instance is confirmed.

In the above-mentioned ruling the court of first instance dismissed the proposal for the issue of a preliminary measure by means of which there would be imposed on the first accused the obligation to refrain from making changes and not permitting a third person to make a change in the data on the owner of the domain "xyz.cz" in the register (database) of domains under the domain of the highest degree "cz", which the first accused administers and which is accessible on the Internet pages at the address http://www.nic.cz, the second accused would then have the obligation to refrain from the provision of any information about his person and about the services which he provides to the public or to individuals through the electronic mail or the pages of the World Wide Web network by utilising the domain with the title "xyz.cz". In the substantiation the court stated that, with regard to his proposal for the issue of a preliminary measure, filed together with his suit concerning the matter itself, the complainant declared that he registered in 1997 with the legal predecessor of the first accused the internet domain "xyz.cz", which he used up to 6 August 2001, and then the second accused began to use it. The latter informed the complainant that he, as the owner of the domain in question, intended to use ithimself, and as of 6 August 2001 he made it impossible for the complainant to gain access to the domain. Through investigation of the first accused the complainant ascertained that as of 14 August 2000 there seemed to have been a transfer of the domain from the complainant to the second accused and that consent to this transfer was given on behalf of the complainant by Mr. M.H. (now a partner of the accused). As the complainant further declared, the legal conditions for the transfer of the domain were not fulfilled, the fulfilment did not occur of the regulations issued by the first accused in 1999, and there was no expression here of the will of the complainant as the owner of the domain to transfer it to a third person, because at the time of the transfer of the domain Mr. M. H. no longer had the mandate of a board member of the complainant and in addition the procedure was not in accordance with the entry in the Commercial Register. Mr. M.H. was also not authorised to transfer the domain. Since the transfer from the complainant to the second accused did not take place legally, the first accused is not fulfilling his contractual obligation to enable the complainant to use the domain "xyz.cz",or rather he is enabling such use to the second accused, as a result of which the complainant has incurred considerable damage. The complainant fears that the first accused might permit a further change in the registration of the domain and therefore he proposed to make this impossible for the first accused by means of a preliminary measure. The second accused, who does business in the same subject of business, promotes his own services on the pages of the domain in question (although he must be aware of the invalidity of its transfer) and thereby commits the activity of unfair competition. After the court had stated the general conditions for the issue of the proposed preliminary measure in the substantiation, it reached the conclusion that in the case in question here the factual circumstances of the relationship of the complainant and the second accused are not properly authorised, pointing to the statement that the transfer of the domain took place already in

August 2000, whereas the complainant used it up to August 2001. For the issue of the proposed preliminary measure in the case of the first accused there is no fulfilment of the condition of the urgency of the adjustment of the relations of the participants or at least verification of the fear that the domain would be further transferred to a third person. The court therefore referred the complainant to proceedings othe matter itself and dismissed the proposal for the issue of a preliminary measure.

The complainant lodged an appeal against this ruling in which he criticises the court of first instance for the incorrectness of its conclusions. Inasmuch as the court pointed out the lapse of one year from the date of the transfer (August 2000) to the termination of the use of the domain by the complainant (August 2001), then the complainant stated once again that only from the letter of the second accused of 4 August 2001 did he learn of the alleged transfer of the domain and its new owner. In this connection he indicated the documents which he submitted in connection with his proposal. With regard to the lack of confirmation of the fear of a possible further transfer of the domain in relation to the first accused, the complainant stated that the very fact that in the case in question the first accused infringed his obligations from the agreement on the registration of the domain with the complainant, did not even respect his own regulations, and then with regard to the behaviour of the accused so far, there is here substantiation of the fear of the complainant that the illegal transfers would continue. He again summed up his reasons for being of the opinion that a preliminary measure should be issued in the proposed wording and proposed that the court of appeal should alter the challenged ruling in this sense.

The court of appeal investigated the ruling of the court of first instance challenged by the appeal in accordance with Par. 212 and following of the Civil Court Code and, without instructing on the case being heard (Par. 214 section 2 letter c) of the Civil Court Code), reached the conclusion that the appeal is justified.

In the case in question the complainant requests the issue of a preliminary measure of the above-mentioned wording, giving as his reason the fact that the first accused infringed with regard to him the agreement on the registration of the domain "xyz.cz" and his own regulations for the registration of domain names when he registered the change in the owner of the domain as of 14 August 2000, and that the second accused, who is now using the domain although he must be aware of the invalid nature of the transfer, is acting towards him in the spirit of unfair competition because - due to the identical nature of the subject of business - he is profiting from the reputation of the complainant and his services as hitherto presented on the pages of the domain and sought after by customers. He declares and has substantiated with the documents submitted that at the general meeting of the company of the complainant on 25 July 2000 the former vice-chairman of the board, Mr. M.H., was not elected to the board of the company, but in the data on the domain he remained registered as the administrative contact person of the complainant in relation to the first accused, and that the above-named informed the first accused on 14 August 2000 of consent to the making of changes in the registration of the domain, and that the above-named became a partner of the accused. He further testified that on 4 August 2001 the second accused told him that, as the owner of the domain, he would be changing its further use from 6 August 2001 and that at present this accused is using this domain (as well as a further domain "abc.cz"). The complainant further testified to the wide use of the domain "xyz.cz", until the change mentioned, for his own presentation and that he now presents himself on the www pages under the domain name "wxyz.cz".

As opposed to the court of first instance the court of appeal considers that for the basic part of the proposal for the issue of a preliminary measure the conditions for its issue in accordance with Par. 102, Par. 74 and following of the Civil Court Code are fulfilled. It is necessary to consider it proven that there occurred here a change in the owner of the domain from the complainant to the accused, a

domain which the complainant yet had essential need of for his activity (for his presentation), and although it will be possible (and necessary) to ascertain and establish for certain the circumstances of this transfer only in the actual hearing of the case, from the documents submitted it can, however, be considered proved by the complainant that this took place against the will of the complainant. The circumstance that it is proved here that in relation to the first accused there acted on behalf of the complainant in the matter of the transfer of the domain someone who later became a partner of the second accused and that here in the decisive period there clearly occurred, according to the minutes of the general meeting, conflicts among the shareholders of the complainant, in which the second accused is just such a minority shareholder, does not testify to the good faith of the second accused in the acquisition of the domain of the complainant (In any case he did not even urgently require this domain for his own presentation, as appears to be demonstrated from the document). The court of first instance was, then, at fault if it did not regulate the relationships of the participants according to Par. 102 of the Civil Court Code by means of the proposed preliminary measure during the period of proceedings on the case itself. It is not in any way disproportionate - in a situation where the presentation of the complainant and the second accused is realised in other domains - to impose an order on the second accused to refrain from his presentation on the pages of the domain "xyz.cz" and at the same time (to preserve the status quo and avoid possible changes in the group of participants) to impose the obligation of the first accused to refrain from carrying out changes (except the transfer of the domain back to the complainant) in the registration of the owner of the domain. For the reasons stated the court of appeal therefore reached the decision that the conditions for the imposition of these orders, including their necessary appurtenances, as a temporary resolution of the relationships of the participants, are in existence here in accordance with Par. 102, Par. 74 and following of the Civil Court Code, and to this extent it therefore altered the challenged ruling in accordance with Par. 220 section 1 of the Civil Court Code, and then in the remainder confirmed the negative finding of the ruling in accordance with Par. 219 of the Civil Court Code.

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*Except for CZ.NIC, all participants of the proceedings are identified with the first letters of their surnames or trade names. The domain name in question is replaced with a **wwwx+y.cz** sequence. All other domain names mentioned in the text have been also replaced with randomly chosen sequences of letters and signs. Except for the identification of the participants or other entities and the pertinent domain names, there were only minimal interventions in the text of the decision. Any relation between the abbreviations and dummy symbols used and the people or domain names using such abbreviations or dummy symbols for purposes of identification is merely accidental.*

When studying this decision, it is necessary to be aware of the fact that the decision comprises not only the verdict alone and the pertinent justification, but also a summary of the claims presented by individual parties involved, and that the court may not have been concerned with some of these claims at all (e.g. with respect to the issue of interlocutory judgement) and that such claims represent merely a legal opinion of the party concerned, not a finding of the court.

This decision may not be automatically applied to other instances even though they may be similar, and the CZ.NIC association recommends consulting each particular case with experts in domain names and lawyers.