Panel Decision for dispute CAC-ADREU-001242

Case number	CAC-ADREU-001242
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Domain names	aponet.eu

Case administrator

Name	Josef Herian

Complainant

Organization / Name	Verwaltungsgesellschaft Deutscher Apotheker mbH (VGDA), Hartmut Schmitt

Respondent

Organization / Name	EURid

INSERT INFORMATION ABOUT OTHER LEGAL PROCEEDINGS THE PANEL IS AWARE OF WHICH ARE PENDING OR DECIDED AND WHICH RELATE TO THE DISPUTED DOMAIN NAME

None of which the Panel is aware.

FACTUAL BACKGROUND

Complainant, Verwaltungsgesellschaft Deutscher Apotheker mbH (VGDA), is the owner of the German trademark "aponet". On December 7, 2005, Complainant submitted two applications for the domain name aponet.eu, respectively at 11:05:07.010 and 18:00:10.409. From EURid public database it appears that Complainant filed the documentary evidence only concerning its second application. The Registry rejected Complainant's second application for the disputed domain name.

The ADR Proceeding:

On May 8, 2006, the Complainant submitted its Complaint against the EURid, concerning the domain name <aponet.eu> (the "disputed domain name"), in accordance with the .eu Alternative Dispute Resolution Rules (the "ADR Rules"). The Complaint was received on May 8, 2006 and in hardcopy on May 31, 2006. The time of filing is May 19, 2006, which is the date of the payment of the ADR's fees. The ADR Center for .eu (the "ADR Center") issued a Request for EURid Verification on May 19, 2006. On May 31, 2006, EURid submitted its Verification for the disputed domain name. On May 31, 2006, the ADR Center formally notified the Respondent of the Complaint and the commencement of the ADR proceeding, fixing a 30 working days period to submit to the ADR Center a response. On July 24, 2006, Respondent filed its response. On July 26, 2006, the ADR Center issued a notification of Respondent's default and on August 1, 2006, contacted the Undersigned requesting his services as a sole Panelist to consider and decide this dispute. On August 2, 2006, the Undersigned accepted and sent his Statement of Acceptance and Declaration of Impartiality. On the same date, the ADR Center notified the parties of appointment of the ADR Panel and Projected Decision Date. On August 7, 2006, the case file was transmitted to the Panel.

A. COMPLAINANT

Complainant affirms that:
a) Verwaltungsgesellschaft Deutscher Apotheker mbH (VGDA), i.e. the Complainant, is owner of the German trademark "aponet". To this end, Complainant enclosed several copies of trademark registration certificates.
b) Since it did not know the reason for the decision of EURid, it would have explained its arguments during the dispute if deemed necessary.

Complainant's Remedies Sought are:

1. The annulment of the decision taken by the Registry, and
2. The transfer of the domain name aponet.eu to Complainant.

B. RESPONDENT

Respondent rejected Complainant’s application for the disputed domain name on the following grounds:

Article 10 (1) of Commission Regulation (EC) No 874/2004 of 28 April 2004 (hereafter "the Regulation") states that only holders of prior rights which are recognised or established by national or Community law shall be eligible to apply to register domain names during a period of phased registration before general registration of .eu domain starts.

VGDA mbh (hereafter "the Complainant") applied for the domain name APONET on December 7, 2005. The validation agent received the documentary evidence on December 19, 2005, which is before the January 16, 2006 deadline. The validation agent concluded from its examination of the Complainant's documentary evidence that the Complainant was not the holder of a prior right. The name of the Complainant differed from the name which was mentioned as the owner of the APONET trademark on the trademark certificate. The Respondent therefore rejected the Complainant's application.

Respondent’s response to complainant’s contentions is here below reported.

The Respondent agrees that the validation agent has made a mistake. Whereas the Complainant identified itself as "name" Gmbh, the trademark mentioned "name" mbH. However, the name mentioned on e.g. the device trademark n° 301 49 922 is VGDA Verwaltungsgesellschaft Deutscher Apotheker mbh. The G which appears to be missing however is the "gesellschaft" in the Complainant's full name. The validation agent concluded that as the type of company appeared to be different, the owner of the trademark and the Complainant were different entities.

For the reasons mentioned, Respondent affirms that the Complaint must be rejected.

DISCUSSION AND FINDINGS

Complainant in its complaint stated that it would have explained its objections to EURid’s decision once Respondent (EURid) had disclosed on which grounds it rejected complainant’s application. Nevertheless, there is no evidence of any further communication from the Complainant following Respondent’s response. Therefore, the Panel in deciding has considered exclusively the documents and arguments made in the Complaint.

Pursuant to Article 22 (8) of Regulation 874/2004 together with paragraph B3 (a) of the ADR Rules the respondent shall submit a Response to the Provider within thirty working days of the date of the delivery of the Complaint. In fact, Respondent has failed to submit its response to the complaint within the time limit of 30 working days from the delivery of the notification of commencement of the ADR Proceeding, which was addressed to the Respondent on May 31, 2006.

Paragraph B3 (f) of the ADR Rules states that «if a Respondent does not submit a Response or submits solely an administratively deficient Response, the Provider shall notify the Parties of Respondent’s default. The Provider shall send to the Panel for its information and to the Complainant the administratively deficient Response submitted by the Respondent». According to paragraph B8 of the ADR Rules, it is solely up to the Panel's discretion whether or not to admit further statements or documents from either of the parties in addition to the complaint or the response.

Article 22 of the Regulation 874/2004 provides that in the case of a procedure against the Registry (i.e. Respondent), the ADR Panel shall decide whether a decision taken by the Registry conflicts with this Regulation or with the European Parliament and the Council Regulation (EC) No. 733/2002 of April 22, 2002 on the implementation of the .eu Top Level Domain.

In accordance with the provisions mentioned above, considering that Respondent’s Delayed Response of July 24, 2006 (which appears to be an administratively deficient response) reveals the grounds on which EURid has rejected Complainant’s application, the Panel believes it is in the interest of the ADR procedure and of both parties’ to consider Respondent’s delayed response. Nevertheless, in the light of paragraph B3 (f) of the ADR Rules, the Panel wishes to note that this delayed response has been considered only for the completeness of information concerning the rejection reasons and that, while deciding on the present case, the Panel has kept in mind Respondent’s default.

While the principal obligations of EURid regarding its decisions to register .eu domain names during the phased registration period are regulated by Article 14 of the Public Policy Rules, the final paragraph of that Article states that EURid shall register the domain name on a first come, first served basis if it finds that the applicant has demonstrated a prior right in accordance with the procedure set out in the second, third and fourth paragraphs of Article 14. In addition, article 12(1) of the Public Policy Rules requires EURid to publish a detailed description of all the technical and administrative measures that it shall use to ensure a proper, fair and technically sound administration

of the phased registration period. Those measures are set out in the Sunrise Rules.
In this case, before rejecting Complainant's application for the domain name aponet.eu, EURid should have verified whether or not the applicant was the holder of a valid prior right. In this case, whether the applicant was the holder of a corresponding and valid registered trademark APONET. In other words, EURid should have verified: a) whether Complainant was eligible to request the disputed domain name; b) whether the domain name applied for corresponded to a registered national or Community trademark; and c) whether the trademark claimed as a prior right (i.e. APONET) was valid, namely in full force and effect.

It clearly appears that the trademarks APONET indicated by Complainant in the Documentary Evidence are identical to the disputed domain name APONET.eu and that they were registered and valid on the date of Complainant's application for the disputed domain name. Nevertheless, the Documentary Evidence does not show as clearly whether or not the Applicant was the holder of a valid prior right i.e. a registered trademark for the name APONET. In fact, from the case file it appears that the domain name aponet.eu was applied for by VGDA Gmbh, while the documentary evidence submitted by Complainant i.e. the copies of six different registration certificates for the trademark APONET indicate as holders of the trademarks the following entities:

1) Device mark ApoNet Registration No. 395 42 472 Owner: Verwaltungsgesellschaft Deutscher Apotheker mbH, Eschborn;
2) Word mark ApoNet Registration No. 395 42 471 Owner: Verwaltungsgesellschaft Deutscher Apotheker mbH, Eschborn;
3) Word mark ApoNet Registration No. 301 29 364 Owner: Verwaltungsgesellschaft Deutscher Apotheker mbH, Eschborn;
4) Device mark ApoNet Registration No. 301 29 363 Owner: Verwaltungsgesellschaft Deutscher Apotheker mbH, Eschborn ;
5) Device mark aponet Registration No. 301 49 922 Owner: VGDA Verwaltungsgesellschaft Deutscher Apotheker mbH, Eschborn; and
6) Trade mark APONET Registration No. 395 36 009 Owner: Pharmatechnik PT Gmbh Herstellung und Vertrieb elektronischer Gerate & Co. Handels – KG, Gauting.
From the documentary evidence it appears that the ownership of this trade mark has been transferred from Pharmatechnik PT Gmbh, Gauting, to Verwaltungsgesellschaft Deutscher Apotheker mbH, Eschborn.

It should be noted that VGDA Gmbh is never addressed as the holder of any of the trade marks indicated by the Complainant. The only (copy of an) official document mentioning the name VGDA is the trade mark registration certificate no. 301 49 922, where the name of the trade mark holder is in fact: VGDA Verwaltungsgesellschaft Deutscher Apotheker mbH, Eschborn.

For the sake of completeness, it should also be noted that on the trade mark registration certificates the holder's address is not specified but only the residing town, i.e. Eschborn. Thus, rendering it more difficult to infer and even less to ascertain on the basis of a prima facie review, whether the Applicant of the domain name and the holder of the prior rights claimed were the same entity or not.

In Section 5 of the .eu Policy it is affirmed that: «A request for registration of a Domain Name will only be considered complete when, through a Registrar, the Registrant (in this case the Complainant) provides the Registry with at least the following information: (i) the full name of the Registrant; .. omissis …» and that «The Registrant is under an obligation to keep the above information complete and accurate at all times throughout the Term of registration .. omissis »;

In Section 3 of the .eu Sunrise Rules - Obligations of the Applicant - it is confirmed that: «An Application is only considered complete when the Applicant provides the Registry, via a Registrar, with at least the following information: (i) the full name of the Applicant»;

In addition, in Section 13 of the .eu Sunrise Rules – Registered Trademarks (Documentary Evidence for Registered Trade Marks) it is affirmed that: «Unless otherwise provided .. omissis.. it is sufficient to submit the following Documentary Evidence for a registered trade mark: (i) a copy of an official document issued by the competent trade mark office indicating that the trade mark is registered… omissis .. In the foregoing case, the Documentary Evidence must clearly evidence that the Applicant is the reported owner of the registered trade mark.»; and

Finally, in Paragraph 2. Section 21 of the Sunrise Rules (Chapter VI. Examination of prior right claims) it is stated that: «the Validation Agent will examine whether the Applicant has a prior right to the name exclusively on the basis of a prima facie review of the first set of Documentary Evidence received».

Therefore, in the absence of any document clearly indicating that a) VGDA Gmbh was the short term for Verwaltungsgesellschaft Deutscher Apotheker mbH; b) that VGDA was also an official company name of the Applicant; and c) considering the Complainant's burden of proof with respect to its prior rights and wording of relevant provisions governing registration of .eu domain names in Sunrise Period, the Panel concludes that the Respondent, without having at its disposal any pertinent document proving that VGDA Gmbh and Verwaltungsgesellschaft Deutscher Apotheker mbH were the same entity, did not err in its decision to reject the Complainant's application. On the contrary, this Panel considers that EURid, in accordance with, Paragraph 3. Section 11 of the Sunrise Rules, correctly considered the Applicant as a different entity from the holder of the Prior Right claimed.

This ADR Panel finds that the decision taken by Respondent to reject Complainant’s application does not conflict with the Regulation 874/2004.

DECISION

For all the foregoing reasons, in accordance with Paragraphs B12 (b) and (c) of the Rules, the Panel orders that the Complaint is Denied

PANELISTS

Name	**Fabrizio Bedarida**

DATE OF PANEL DECISION 2006-08-07

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

Complainant, Verwaltungsgesellschaft Deutscher Apotheker mbH (VGDA), is the owner of the German trademark "aponet". On December 7, 2005, VGDA Gmbh submitted an application for the domain name aponet.eu. The Registry rejected Applicant’s application for the disputed domain name.
Complainant affirms that Verwaltungsgesellschaft Deutscher Apotheker mbH (VGDA), i.e. the Complainant, is owner of the German trademark "aponet". To this end, Complainant enclosed several copies of trademark registration certificates. Complainant requests the annulment of the decision taken by the Registry, and the transfer of the domain name aponet.eu to Complainant.

Respondent rejected Complainant’s application for the disputed domain name on the ground that the name of the Complainant differed from the name which was mentioned as the owner of the APONET trademark on the trademark certificates. Respondent requests that the Complaint must be rejected.

It clearly appears that the trademarks APONET indicated by Complainant in the Documentary Evidence are identical to the disputed domain name APONET.eu and that they were registered and valid on the date of Complainant’s application for the disputed domain name. Nevertheless, whether the Applicant was the owner of a valid registered trademark for the name APONET or not does not appear as clearly. In fact, from the case file it appears that the domain name aponet.eu was applied for by VGDA Gmbh, while the documentary evidence submitted by complainant i.e. the copies of six different registration certificates for the trademark APONET indicate as holders of the trademarks different entities. VGDA Gmbh is never addressed as the holder of any of the trade marks indicated by the Complainant. The only (copy of an) official document mentioning the name VGDA is the trade mark registration certificate no. 301 49 922, where the name of the trade mark holder is in fact: VGDA Verwaltungsgesellschaft Deutscher Apotheker mbH, Eschborn.

1) Section 3 of the .eu Sunrise Rules - Obligations of the Applicant - where it is confirmed that: «An Application is only considered complete when the Applicant provides the Registry, via a Registrar, with at least the following information: (i) the full name of the Applicant»;
2) Section 13 of the .eu Sunrise Rules – Registered Trademarks (Documentary Evidence for Registered Trade Marks) affirms that: «Unless otherwise provided .. omissis.. it is sufficient to submit the following Documentary Evidence for a registered trade mark: (i) a copy of an official document issued by the competent trade mark office indicating that the trade mark is registered… omissis .. In the foregoing case, the Documentary Evidence must clearly evidence that the Applicant is the reported owner of the registered trade mark.»; and
3) Paragraph 2. Section 21 of the Sunrise Rules (Chapter VI. Examination of prior right claims) which states that: «the Validation Agent will examine whether the Applicant has a prior right to the name exclusively on the basis of a prima facie review of the first set of Documentary Evidence received».

Therefore, in the absence of any document clearly indicating that a) VGDA Gmbh was the short term for Verwaltungsgesellschaft Deutscher Apotheker mbH; b) that VGDA was also an official company name of the Applicant; and c) considering the Complainant’s burden of proof with respect to its prior rights and wording of relevant provisions governing registration of .eu domain names in Sunrise Period, the Panel concludes that the Respondent, without having at its disposal any pertinent document proving that VGDA Gmbh and Verwaltungsgesellschaft Deutscher Apotheker mbH were the same entity, did not err in its decision to reject the Complainant's application. On the contrary, this Panel considers that EURid, in accordance with, Paragraph 3. Section 11 of the Sunrise Rules, correctly considered the Applicant as a different entity from the holder of the Prior Right claimed.
This ADR Panel finds that the decision taken by Respondent to reject Complainant’s application does not conflict with the Regulation 874/2004.