Panel Decision for dispute CAC-ADREU-001519

Case number	**CAC-ADREU-001519**
Time of filing	**2006-06-05 13:00:42**
Domain names	**gamepoint.eu**

Case administrator

Name	**Tereza Bartošková**

Complainant

Organization / Name	**GamePoint B.V., Amon Friso Endt**

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

The Panel is not aware of any other legal proceedings which are pending or decided and which relate to the disputed domain name.

FACTUAL BACKGROUND

1. The domain name application proceeding

The Complainant, the Dutch company GamePoint B.V. applied, on December 8, 2005, for the registration of the domain name “gamepoint.eu”, i.e. during the Sunrise period. On December 19, 2005, the processing agent received the documentary evidence with the cover letter, i.e. before the January 17, 2006 deadline.

In the beginning of January 2006, the Complainant called the EURid Team to know what was the status of the domain name application. It was then been told that the cover letter had not been signed.

Although the Complainant denies that the cover letter was not signed, it sent again the documentary evidence with a signed cover letter.

At the end of April 2006, the Complainant found out according to the Whois database that its application had been rejected.

Questioning the EURid Team on the reason of this refusal, it was answered that the cover letter had not been signed and that the application had been rejected for this reason on April 14, 2006. On May, 12, 2006, the Respondent sent an email to the Complainant, confirming that the application had been rejected because “the annex was not signed” and that an automatic rejection email had been sent on April 14, 2006. This email is one of the annexes attached to the Complaint.

2. The ADR proceeding

On May 22, 2006, GamePoint submitted by email a Complaint to the ADR Center, which received it in hard copy on May 26, 2006.

The ADR proceedings formally started on June 12, 2006.

On August 6, 2006, EURid sent its response to the Complaint.

The Panel notified a non standard communication to EURid and to the Complainant. It requested EURid to disclose the entire file which

has been sent by the Complainant to the processing agent within the fourty days' deadline. It requested the Complainant to communicate the signed cover letter it sent to EURid within the fourty days' deadline.

EURid answered that :

"According to sections 7, 3 & 21, 2 of the Sunrise Rules:
Section 7, 3 "It is the obligation of the Processing Agent to inform the Registry of a change in status within a reasonable timeframe following receipt by the Processing Agent of the first set of Documentary Evidence relating to a particular Application. No other communication is given by the Processing Agent on whether or not the Documentary Evidence has been received and the date of receipt thereof. The Sunrise WHOIS Database is the only point of reference for verifying whether the Processing Agent has received Documentary Evidence.
Section 21, 2 : "2. The Validation Agent examines 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 and scanned by the Processing Agent (including the Documentary Evidence received electronically, where applicable) and in accordance with the provisions of these Sunrise Rules".
If the complainant sent a second set of documentary evidence in January after having sent the first set of documentary evidence, the respondent was not communicated about this. Indeed, as section 7, 3 states, the Processing Agent is obliged to inform the Registry of a change in status within a reasonable timeframe following receipt by the Processing Agent of the "first set" (and not to the subsequent sendings)of Documentary Evidence relating to a particular Application. Therefore, the respondent is unable to disclose the cover letter requested."

The Complainant answered that "Since PWC sends all documentation, even documentation received after the 40-day deadline to EURid, EURid should be able to communicate the cover letter fron the beginning of January. In the end Complainant has sent all needed evidence and a signed cover letter to EURid via PWC. Although this sending might have had some administrative imperfections, the request of Complainant should be judged on his merits since the meaning of the regulation is to make phased registration possible for entities with a prior right like Complainant".

A. COMPLAINANT

2.The Complainant argues that the decision to reject its application for the registration of the domain name "gamepoint.eu" conflicts with the European Union Regulations for the following reasons:

2.2. The cover letter was signed or at least a signed cover letter with all the documents was sent before the end of the deadline for receipt of documentation. Therefore the application could not have been rejected for the formal reason that the cover letter was not signed, but should have been judged on its merits

2.3. Complainant satisfies all the criteria for phased registration of a prior right, such as set out in the Regulations (Complainant is the holder of the Benelux trademark Gamepoint and of the Dutch company name Gamepoint B.V.).

2.4. Even if the application could have been rejected on the formal reason that the cover sheet was not signed, this decision is in this case conflicting with European Union Regulations because it was taken so late (after the closing period of sunrise 1 and 2) that another application from Complainant for the same domain name was not possible anymore. Moreover, the Respondent's decision conflicts with the European Union Regulations whose aim is to protect companies which have a prior right and want to register a domain name in ".eu". Since no other party has applied for this domain name during the sunrise period and since no other party exist that has a real interest in this domain name, if the Complaint is denied the result will be that other parties will be able to register the domain name and then sell it to the Complainant who has prior rights.

2.5. For the reasons mentioned above, the Complainant requests the annulment of Respondent's decision and the registration of the domain name "gamepoint.eu".

B. RESPONDENT

3.The Respondent argues that:

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

3.2. Article 3 sates that "The request for domain name registration shall include all of the following :a) the name and the address of the

requesting party ;
b) a confirmation by electronic means from the requesting party that it satisfies the general eligibility criteria set out in article 4(2)(b) of Regulation (EC) No 733/2002 ;
c) an affirmation by electronic means from the requesting party that to its knowledge the request for domain name registration is made in good faith and does not infringe any rights of a third party ;
d) an undertaking by electronic means from the requesting party that it shall abide by all terms and conditions for registration, including the policy on the extra-judicial settlement of conflicts set out in Chapter VI".
The Complainant applied for the domain name on December 8, 2005 and the processing agent received the documentary evidence on December 19, 2005, i.e. before the January 17, 2006 deadline.
The validation agent concluded that the Complainant had not signed the cover letter and had therefore not agreed to representations and warranties thereon. Therefore, the Respondent rejected the application.

3.3. Article 3 refers to a number of representations and warranties which an applicant must agree to. An application will not be further examined unless these representations and warranties have been agreed to. An important representation is that the applicant must agree that it shall abide by all the terms and conditions for registration, including the policy on extra judicial settlement. This representation is of great importance, as it effectively enforces all applicable rules, including the terms and conditions which apply to the registration, against an applicant. An applicant's consent to this representation is therefore an essential element of the registration agreement between an applicant and the Respondent.

3.4. Representations and warranties can of course only be enforced against a party if this party has actually agreed to them. That is why, pursuant to article 3 of the Regulation, all these representations and warranties are mentioned on the cover letter. Still it is not sufficient just to mention these representations and warranties on the cover letter. They must also be read, approved and signed. An unsigned cover letter would have the effect that all representations and warranties mentioned in article 3 of the Regulation would not be enforceable against an applicant. That is why it is of great importance that the cover letter is signed by an applicant. That is why an unsigned cover letter must be rejected.

3.5. Article 3 of the Regulation states that any material inaccuracy in the elements set out in points (a) to (d) shall constitute a breach of the terms of registration. Not agreeing to these representations and warranties, whereas an applicant is expressly requested to do so pursuant to the wording used in article 3 of the Regulation, must be considered a material inaccuracy.

3.6. The Respondent's decision to reject the application was not too late. The Regulation does not refer to a deadline for completion of the validation. The Respondent is not obliged to decide on an application within a given timeframe. Millions of domain names have been applied for during the phased registration period. It is not unreasonable to say that the validation of an application will take time. It may well be that the decision to reject an application is made after the end of the Sunrise Period, or after a subsequent application for the same domain name has been filed by a third party.

3.7. It is insufficient for an applicant to be the holder of a prior right. An applicant must prove that it is the holder of prior right (by submitting documentary evidence thereto), an applicant must also send this documentary evidence in due time, an applicant must agree to the Terms and Conditions, etc… Before submitting an application it is important that the applicant acquaints itself with these rules. So as to make the application procedure more transparent to the applicants, article 12 (1) 3 of the Regulation states that the additional framework rules, such as the Sunrise Rules, must be published on the Respondent's website. The reason for this transparency is simple. An application will be rejected if the applicable rules and regulations have not been complied with, even if an applicant is in fact the holder of a prior right. Given the large amount of applications, an application will often be rejected after the Sunrise Period has expired or after a subsequent application by a third party. An applicant will often have only one chance to register a domain name during the phased registration period. Therefore it is important that an applicant knows exactly what to do, so as to avoid the rejection of his application on formal grounds.

3.8. The Respondent's help desk is always ready to answer any question by applicants. Should the Respondent's help desk have been contacted by the Complainant in the situation at hand, it would surely have advised the Complainant to submit a new application so as to be fully in line with all applicable rules and regulations. No such application was received.

3.9. The Complainant did not comply with the formal rules. Applications made during the phased registration period may only be accepted if all applicable rules and regulations have been complied with. The fact that no other application was made for the same domain name may not lead to another result as this would amount to a discrimination of applicants for domain names with multiple applications. All applicants must be treated equally. The Complainant's application was rejected on formal grounds. Pursuant to section B 11 of the ADR rules, in ADR proceedings against the Respondent the domain name may only be attributed to a Complainant if certain

conditions have been fulfilled. One of these conditions is that the Respondent must have decided that the Complainant satisfies all registration criteria. The application was not examined on the merits. The Respondent thus has not decided that the application meets all criteria. Therefore, the domain name cannot be attributed to the Complainant via the present ADR proceedings.

DISCUSSION AND FINDINGS

3. First of all, the Panel considers that the Complainant can not make EURid responsible for its present situation. It could have applied a second time for the same domain name, in January 2006 and before the end of the phased registration period since, according to its Complaint, it called the EURid Team to have information about the examination of its documentary evidence and it was answered that the cover letter was not signed.
3.1.The Panel understands that the issue is the respect of Article 3 of the Regulation and not the question of the prior rights, even if the purpose of the phased registration period has been to protect prior rights, according to Regulation No 733/2002 of April 22, 2002 (recitals, 16).
3.2. The verification of the applications submitted during the phased registration procedure under Articles 10, 12 and 14 has to take place before the registration. According to Article 3, the purpose of the verification is to check the validity of the registration, when it takes place after the registration or pursuant to a dispute, or the validity of the application when it takes place before the registration, i.e. if the application was submitted during the phased registration period, which was the case in the present Complaint.
3.3. According to Article 20, a registered domain name may still be revoked by the Registry on the ground that the holder breaches the terms of registration under Article 3. Revocation means cancellation. It proves that the breach or the non respect of the terms of registration is a matter of validity.
3.4. In the Panel's view, the issue in the case is the respect of the requirements laid down in Article 3 of EC Regulation No. 874/2004 during the phased registration period.
Pursuant to said Article 3:
“The request for domain name registration shall include all of the following:
a) (…)
(b) a confirmation by electronic means from the requesting party that it satisfies the general eligibility criteria set out in Article 4(2)(b) of Regulation (EC) No 733/2002;
c) an affirmation by electronic means from the requesting party that to its knowledge the request for domain name registration is made in good faith and does not infringe any rights of a third party;
(d) an undertaking by electronic means from the requesting party that it shall abide by all the terms and conditions for registration, including the policy on the extra-judicial settlement of conflicts set out in Chapter VI.
Any material inaccuracy in the elements set out in points (a) to (d) shall constitute a breach of the terms of registration”.

3.5. The electronically generated cover letter was drafted according to the provisions of Article 3. It required the Complainant to sign it, to mention its quality and the date. According to this document, the words “read and approved” have to precede the signature.

3.6. Article 3 requests the applicant to “confirm” that it satisfies the eligibility criteria, to “affirm” its bona fide and to “undertake” to abide by all the terms and conditions for registration.

3.7. “Undertake” means “to promise or agree”. A signature identifies the writer and the origin of the document, confirms the information in the document and proves that the signatory agrees with the terms of the document.

3.8. The Panel considers that the signature of the cover letter is indispensable to prove that an Applicant “confirms” that it satisfies the eligibility criteria, “affirms” its bona fide and “undertakes” to abide by all the terms and conditions for registration “, according to Article 3.

3.9. The burden of proof is on Complainant. Complainant has been unable to prove that a signed cover letter has been sent, or at least that it had, by any other means, confirmed that it satisfied the eligibility criteria, affirmed its bona fide and that it had undertaken to abide by all the terms and conditions for registration.

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	**Marie Emmanuelle Haas**

DATE OF PANEL DECISION 2006-08-23

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant filed an application for the domain name “gamepoint.eu” on the basis of the Benelux trade mark GAMEPOINT and sent a cover letter and documentary evidence. The Respondent rejected the Complainant’s application on the ground that the Complainant had not signed the cover letter.

Complainant denied that the cover letter was not signed but claimed that it nevertheless sent a second signed cover letter within the 40-day time period. In addition, Complainant claimed that irrespective of whether or not the cover was signed, Complainant had a prior right and satisfied all the criteria for phased registration.

Respondent answered that the cover letter contained the representations and warranties to be agreed to in accordance with Article 3 of Regulation No. 874/2004, that not signing the cover letter means not agreeing to these representations and warranties and that not agreeing to them must be considered a material inaccuracy within the meaning of Article 3 of said Regulation and therefore a breach of the terms of registration. Respondent further answered that it had not received any signed cover letter.

In the Panel's view, the issue in the case is the respect of the requirements laid down in Article 3 of EC Regulation No. 874/2004 prior the registration of the domain name.

The electronically generated cover letter was drafted according to the provisions of Article 3. It required the Complainant to sign it, to mention its quality and the date. According to this document, the words “read and approved” have to precede the signature.

Article 3 requests the applicant to “confirm” that it satisfies the eligibility criteria, to “affirm” its bona fide and to “undertake” to abide by all the terms and conditions for registration. “Undertake” means “to promise or agree”. A signature identifies the writer and the origin of the document, confirms the information in the document and proves that the signatory agrees with the terms of the document. The Panel considers that the signature of the cover letter is indispensable to prove that an Applicant “confirms” that it satisfies the eligibility criteria, “affirms” its bona fide and “undertakes” to abide by all the terms and conditions for registration “, according to Article 3.

The burden of proof is on Complainant. Complainant has been unable to prove that a signed cover letter has been sent, or at least that it had, by any other means, confirmed that it satisfied the eligibility criteria, affirmed its bona fide and that it had undertaken to abide by all the terms and conditions for registration.

The Complaint is therefore denied.