Panel Decision for dispute CAC-ADREU-001699

Case number	**CAC-ADREU-001699**
Time of filing	**2006-06-13 11:17:26**
Domain names	**frisia.eu**

Case administrator

Name	**Eva Zahořová**

Complainant

Organization / Name	**DSB Bank N.V., dhr Michel Akkers**

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 pending or decided legal proceedings which may affect the disputed domain name.

FACTUAL BACKGROUND

The Complainant is DSB Bank N.V. registered in Netherlands. The Complainant is legal ancestor of DSB Groep, N.V. who filed the Application to register the domain name FRISIA.EU. The Application was received by the registry on 7/12/2005, i.e. in the Sunrise I period.

The documentary evidence was originally submitted on 9/1/2006. The documentary evidence contained a copy of Benelux trademark registration No. 0647430 for the word trademark “FRISIA” issued by the Benelux Trademark Office.

On 29/4/2006, the Registry notified a rejection of the Application.

The Complainant seeks annulment of the decision rejecting the Application and attribution of the domain name FRISIA.EU to the Complainant.

A. COMPLAINANT

The Complainant contends that the decision of the Registry violated Regulations (EC) No 733/2002 and (EC) No 874/2004, as the application of Public Policy Rules was in breach of basic principles of European law, namely principles of good administration, duty of care and the principle of proportionality.

The complainant recapitulates following facts:
- that the Application relied on a valid Benelux trademark right for the word mark “FRISIA”;
- that trademark was valid and in force at the application date and in fact has been so since 1999;
- that the .eu domain name applied for, frisia.eu corresponds 100% with the prior trademark “FRISIA”;
- that no other trademark owners filed an application for the frisia.eu domain name prior to DSB’s filing in Sunrise I.

The Complainant also recapitulates the history of mergers and changes of company names in companies that finally merged and now legally exist as DSB Bank N.V. The Complainant notes that the company recorded by the Benelux Trademark office as the holder of the trademark “FRISIA” was Buro Frisia, later renamed to Frisia Financieringen Wognum B.V.

The Complainant admits that there might have been some confusion with the Validation Agent in the process of assessment of the Application, because of difference in legal identity of the Complainant and the trademark holder. The Complainant also assumes that the

fact that at the date of the Application, the holder of the trademark rights and the Applicant were not the same legal entity, might have been the cause for the rejection of the Application. However, the Complainant stresses the fact that for all commercial and tax intents and purposes, the Complainant and the trademark holder had already formed one integral enterprise at the date of filing of the Application and that they became one legal entity by the time the documentary evidence for the Application was filed.

The Complainant expresses the opinion that difference in legal identities of the Complainant and the trademark holder at the moment of filing the Application should not have been the reason for immediate and irrevocable rejection of the Application.

The Complainant argues that while
- during Sunrise I, the Validation Agent receives an Application for a Domain Name;
- which Application includes clear Documentary Evidence of a valid trademark registered by the Benelux Trade Marks Office, existing already since 1999;
- which trademark is completely identical to the domain name requested,
- but which Application leaves the Validation Agent in doubt as to the correct identity of the Applicant, it would have been reasonable for the Validation Agent to carry out at least a minimal amount of investigation to possibly clear these doubts and/or at least provide the Applicant an opportunity to provide clarifications as to the identity of the legal entities involved and make corrections to the Application if administrative mistakes would have been made.

The Complainant also argues that by not taking further investigation in this case and making it possible for the Complainant to clarify the Application and/or correct formal mistakes, the Registry (through the Validation Agent) has applied the Public Policy Rules in contravention to fundamental principles of EC law, namely to principles of good administration, duty of care and the principle of proportionality.

To support argument of the Registry being in breach of principles of good administration and duty of care, the Complainant cites ECJ case law, namely cases co. 10/88 and T-211/02 as well as the Panel decision no. 00253. The Complainant also stresses the fact that further investigation taken as a result of application of named principles could have been facile and its result would clearly and immediately support the Application.

As to the the argumentation by principle of proportionality, the Complainant cites ECJ cases No. T211/02 and C-157/96. The Complainant argues that lack of activity in further investigation and communication of the Registry is to be understood as contrary to purpose of Regulations (EC) No. 874/2004 and (EC) No. 733/2002. The Complainant stands on opinion that due to the fact that the Registry did not actively investigate legal identities relevant for the Application, the purpose of the named Regulations was not fulfilled in this case.

Consequently to presented arguments, the Complainant requests the Panel to annul the decision of the Registry and to attribute the domain name FRISIA.EU name to the Complainant.

B. RESPONDENT

The Respondent is EURid. The Response was filed on 16/08/2006 in additional period granted before appointment of the Panel by the Provider pursuant to art. A(2)(i) of the ADR Rules.

The Respondent contends that the decision to reject the Complainant's application conformed to applicable Regulations and the Sunrise Rules.

The Respondent refers to prior decisions of the Panel No. 00551, No. 00810 and No. 01194 arguing that ADR proceedings against the Registry may not serve as a “second chance” or an additional round providing applicants an option to remedy their imperfect original application that was rejected during the Sunrise Period.

The Respondent argues that the documentary evidence did not substantiate that the Complainant was the holder or the licensee of a prior right at the time of the application and that new documents submitted for the first time during the present ADR proceedings should not be taken into consideration in assessment of the Respondent’s decision. Exclusion of evidence extra to that already submitted within the Sunrise Period is argued by the Respondent also by references to prior decisions of the Panel No. 00294 and No. 01549.

The Respondent also points out legitimate expectations of other applicants for the domain name that was referred to by prior decision of the panel No. 00894.

The Respondent argues that even if the Panel decided to take a look at documents newly submitted by the Complainant, the Panel would

be able to conclude that the Complainant was not the same person as the holder of the prior right on the date of the application (7/12/2005), since they merged only on 23/12/2005. Consequently, the respondent points out that the Applicant must demonstrate its prior rights at a time no later than the date of the application in order to be eligible to apply for a domain name during the Sunrise Period.

The Respondent declares its respect to principles of good administration, duty of care and proportionality. However, the Respondent vigorously contests the strictly analogical transposition of these principles into the present case, insofar as they would impose to the Respondent the obligation to conduct further investigation into the deficiencies of applications that do not provide the required documentary evidence, such as in the disputed case. To support that argument, the Respondent also refers to prior decision of the Panel No. 00810.

The Respondent concludes that the Regulation and the Sunrise Rules give all the holders of prior rights the opportunity to demonstrate their prior rights during the phased registration. In order to benefit from this opportunity, applicants must comply with the strict procedure laid out by the Regulation for dealing with the thousands of applications received during the phased registration. While the complainant has not, in the Respondent's view, complied with the procedure and its requirements, the Respondent requests the Panel to reject the Complaint.

DISCUSSION AND FINDINGS

As validity of presented evidence was not challenged by parties, the Panel assumes that the discussion can be based on following facts:

- the Complainant filed an Application to register the domain name FRISIA.EU on 7/12/2005.
- at the moment of the application, the Applicant was different legal entity than the holder of Benelux word trademark "FRISIA"
- with legal effects since 24/12/2005, the Complainant merged with the holder of Benelux trademark "FRISIA"
- on 9/1/2006, the Complainant submitted documentary evidence supporting the Application. The evidence did not contain any documents showing that the Complainant and holder of the trademark FRISIA formed one legal entity.
- on 29/4/2006, the Respondent notified the Complainant that the Application was rejected. The notice did not contain any reasoning. The Respondent reasoned the notice later in the Response by mismatch in legal personality of the trademark holder and the Applicant.

As can be seen both in the Complaint and the Response, the dispute between parties arose due to their different interpretation of Regulations (EC) No 733/2002, (EC) No 874/2004 and the Sunrise Rules. The task of the Panel in this case is to decide whether cited Regulations and related Rules are to be interpreted for the present case as requiring the Respondent to initiatively investigate facts relating to faulty Application of the Complainant.

Wording of Section 21(3) of Sunrise Rules expressis verbis defines permission, but no obligation, for the Validation Agent to further investigate into the circumstances of the Application in its sole discretion. Validation Agent was acting in the disputed matter on behalf of EC administrative bodies and its procedural activities had direct consequences in terms of EC law. Consequently, the Validation Agent was with no doubt bound not just by mere words of EC law and related documents, but also by principles of EC law. In the present case, the Panel has to determine whether applicable black-letter regulations and principles of EC law should have been applied by the Validation Agent and the Respondent in the sense of giving them not just possibility but an obligation to initiatively investigate circumstances of the Application submitted by the Complainant.

Whenever principles of law are applicable, it is to be noted first that they substantially differ from legal norms. When they are recognized as sources of law, it is no more a question of their applicability, but of intensity in which they apply on particular case (Alexy:1995). Then, like in this case, it can be seen that some question in law is to be answered upon multiple principles that all apply, but that lead to opposite conclusions. The task is then to decide which principles will be given higher or lower ad hoc relevance, i.e. to ad hoc asses intensity of their application.

In general, there can be seen two kinds of legal principles, both having different teleology. Principles such as those of good administration, duty of care, proportionality, material truth and others are applied in order to protect fairness of law (Fuller:1964). On the other hand, there are principles protecting certainty of law such as principle of concentration, formal truth, formal equality, vigilantibus iura, etc. (Hart:1965). In the present case, the Complainant claims higher relevance of principles of the first kind, while the Respondent defends its decision by arguing otherwise.

In case law of ECJ cited by the Complainant, there was found a reason for giving principles of procedural fairness higher relevance than principles of legal certainty. However, it is to be noted that those procedures and their circumstances substantially differ from the present case. Firstly, nature and purpose of procedures in ECJ cases No. 10/88 and T-211/02 differ from procedures set by Regulations (EC) No 733/2002 and (EC) No 874/2004 and so can differ the ad hoc balance of applicable principles. The procedure of verification during Sunrise periods is from its beginning designed and proclaimed as strict, swift, strongly formal and consequently also relatively

cheap - such facts have to affect, in the view of the Panel, also ad hoc balance of applicable principles in favour of those protecting formal and legal certainty.

Secondly, in all cases cited by the Complainant, including Panel decision No. 00253, emphasis on principles of procedural fairness (such as principles of duty of care, proportionality, etc.) was appropriate, as it caused removal of unreasonable procedural formalism. However, in the present case, the problematic point of the procedure was originally not formal, but purely material, because the Applicant was not legaly identical to the holder of the trademark at the moment of submission of the Application.

That mistake could still have been corrected by the Complainant by indicating to the registry the fact that between submission of the Application and submission of documentary evidence, the Applicant and holder of the trademark became one legal entity (such evidence could have been submitted even additionally - see for example Panel decision No. 01071). Unfortunately, the Complainant failed to submit any evidence or indication of that kind.

It is beyond any doubt that if further investigation was taken by the Respondent, it would be possible to clarify that Complainant is entitled to claim its priority rights under Sunrise I requirements. The Panel applies principles of good administration, duty of care, proportionality and material truth to their highest possible extent stating that the Respondent can be found obliged to take such further investigation, but only in case when some doubts could prima facie arise over formal quality of the application (see Panel decisions No. 00253, No. 00830, 00325, and others). However, due to Complainant's mistake at the moment of submitting the Application and omission at the phase of submitting the documentary evidence, there could have appeared no doubts over submitted application at Respondent, as the Applicant and the holder of the trademark were indisputably indicated in the Application as different legal entities.

Summing up all relevant arguments regarding ad hoc application of principles of EC law, the Panel has to conclude that in the present case, it is appropriate to emphasize principles of concentration, vigilantibus iura and other principles of legal certainty. Such emphasis, namely on principles of concentration and vigilantibus iura, was also proclaimed in general for various domain procedures by numerous formulations of .eu domain legislation (for example rec. 12 and art. 14 of the Regulation (EC) 874/2004, sec. 8, 9, 10, 21 of the Sunrise Rules and others) and so the Complainant and other entities involved in domain procedures could have from the beginning relied on their importance. Consequently, the Panel does not see the decision of the Respondent on rejection of the disputed Application as contrary to principles of EC law as claimed by the Complainant.

As circumstances of the case has lead the Panel to find the rejection of the disputed Application being in accordance with principles of EC law, the Panel can respectfully follow its recent practice regarding assessment of faulty or substantially deficient Applications submitted in Sunrise periods (Panel decisions No. 00119, No. 00294, No. 00551, No. 00810, No. 01194 and others) by stating that ADR is not to be understood as a procedure where the Applicant could later correct its own former substantial procedural mistakes. Thus, the only possible conclusion to be drawn ad hoc from all above arguments is dismissal of the complaint.

DECISION

For all the foregoing reasons, in accordance with Paragraph B12 of the Rules and Section 27 of the Sunrise Rules, the Panel orders that the Complaint is Denied.

PANELISTS

Name	**Radim Polcak**

DATE OF PANEL DECISION 2006-09-03

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant contests the decision of rejection issued by the Respondent against its domain application "FRISIA.EU" under Sunrise I.

Rejection was based upon the fact that the documentary evidence supplied revealed a mismatch between the Applicant and holder of the trademark.

The Complainant claimed the rejection being against principles of EC law, namely principles of proportionality, duty of care and good administration.

Intensity in which principles of law are applied depends on nature and circumstances of the case. In case of Sunrise registration, the procedure was designed, proclaimed and maintained as swift and formal. This together with the fact that defects of the Application were

not purely formal but had material consequences, leads the Panel to ad hoc emphasize principles of concentration and vigilantibus iura over those claimed by the Complainant.

The Complaint is Denied.