Panel Decision for dispute CAC-ADREU-002050

Case number	CAC-ADREU-002050
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Domain names	automotogazeta.eu, gazeta.eu, gazetawyborcza.eu

Case administrator

Name	Eva Zahořová

Complainant

Organization / Name	Agora SA, Marek Szydlowski

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 about other legal proceedings which are pending or decided which relate to the disputed domain name

FACTUAL BACKGROUND

Agora S.A. (hereafter "the Applicant") applied for the domain names AUTOMOTOGAZETA, GAZETA and GAZETAWYBORCZA. The processing agent received the documentary evidence before deadline. The validation agent concluded from its examination of the documentary evidence that the Complainant did not appear to have a valid trademark on the name AUTOMOTOGAZETA, as there is no documentary evidence that the trademark is still valid and as the documentary evidence shows that the composite trademark concerns the name AUTO-MOTO GAZETA. - the Complainant did not appear to have a valid trademark on the name GAZETA, as it seems there is no documentary evidence that the trademark is still valid and as the documentary evidence shows that the composite trademark concerns the name GAZETA WYBORCZA. - the Complainant did not appear to have a valid trademark on the name GAZETA WYBORCZA, as there is no documentary evidence that the trademark is still valid. Those are mainly the reasons expressed by the Complainant for which EURid (the Respondent) would have had to reject the application.

A. COMPLAINANT

The Complaint is based on the provisions of Commission Regulation (EC) No 874/2004 of 28 April 2004 ("the Regulation") which in Article 10 specified that holders of prior rights recognized or established by a 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, and that prior rights include, inter alia, registered national trademarks as well as trade names and business identifiers. In accordance with the above Regulation, the phase registration period is a period during which holders of prior rights can register .eu top level domains. The .eu Registration Policy and Terms and Conditions for Domain Name Applications made during Phased Registration Period ("the Sunrise Rules") specify in detail the documents and statements that the applicant must present to validate its claim to register an .eu top-level domain. The Complainant, wishing to register the three domains disputed in this claim during the so-called Sunrise Period, presented the relevant documents during registration, however, due to reasons unknown to him, his applications in respect of the disputed domains were denied. Hence, the Complainant submits this Complaint. The Complainant satisfies the general eligibility criteria within the meaning of the provisions of Article 4.2.b.(i) of the Regulation (EC) No. 733/2002 of the European Parliament and of the Council of 22 April 2002 on the implementation of the .eu Top Level Domain as it is a company registered under the laws of Poland (see: http://www.agora.pl/agora_eng/1,66570,2816316.html). Below is the justification of prior rights in the case of each of the disputed domains. 1. Regarding the domain "automotogazeta.eu". In accordance with Section 11 (3) of the Sunrise Rules the registration of a top-level domain during the Sunrise Period was possible where the applicant was the owner a national registered trademark. The Complainant is the owner of a trademark "auto-motogazeta". In accordance with Article 11 of the Regulation a hyphen belongs to the category of special characters which can be entirely eliminated from the corresponding domain name. Although the hyphen is not explicitly listed among the special characters in Article 11 of the Regulation, the fact that the list of special characters is preceded by the

sentence: "Special character and punctuations as referred to in the second paragraph shall include the following:" means that the list that follows is only exemplary and not exhaustive. Such interpretation allows the trademark become a basis for registration of the domain "automotogazeta.eu". A copy of the trademark registration certificate, together with an English translation, is attached to this complaint (Annexes 2a and 2b). Due to the above reasons the Complainant justifies that the Registry decision regarding the domain "automotogazeta.eu" be cancelled and the domain transferred or attributed to the Complainant. 2. Regarding the domain "gazeta.eu" The Complainant maintains an internet portal http://www.gazeta.pl/. The Polish domain gazeta.pl has been registered by the Complainant with one of the Polish internet domain registrars - NASK (http://www.dns.pl/english/index.html). Attached is a copy of an invoice for the services of NASK connected with the registration of the domain "gazeta.pl" as well as a printout from the NASK WHOIS database (Annexs 4a and 4b and Annexes 5a and 5b). The domain "gazeta.pl" is one of the most distinctive domains in the Polish internet market. Over 40% of Polish internet users use the services of the internet portal which can be entered into through "gazeta.pl". Attached is a letter from the Polish internet research company, PBI (Annexes 3a and 3b). The above evidence, in accordance with Section 16.5 of the Sunrise Rules, constitutes sufficient evidence to claim that "gazeta" as far as the internet business is concerned is a trade name or business identifier associated with the Complainant. Registering the domain "gazeta.eu" in favour of any other person, would allow for that person to build its business position using the position of "gazeta.pl" in Poland and as such would be - at least under the laws of Poland - an act of unfair competition. Due to the above reasons the Complainant justifies that the Registry decision regarding the domain "gazeta.eu" be cancelled and the domain transferred or attributed to the Complainant. 3. Regarding the domain "gazetawyborcza.eu" In accordance with Section 11 (3) of the Sunrise Rules the registration of a top-level domain during the Sunrise Period was possible where the applicant was the owner a national registered trademark. The Complainant is the owner of a trademark "gazeta wyborcza". A copy of the trademark registration certificate, together with an English translation, is attached to this complaint (Annexes 6a and 6b). Due to the above reasons the Complainant justifies that the Registry decision regarding the domain "gazetawyborcza.eu" be cancelled and the domain transferred or attributed to the Complainant.

B. RESPONDENT

1. 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. Article 12 (3) of the Regulation provides that the request to register a domain name based on a prior right shall include a reference to the legal basis in national or Community law for the right to the name, such as a trademark, as well as other relevant information, such as trademark registration number Article 14 (4) of the Regulation states that every applicant must submit documentary evidence that shows that he or she is the holder of the prior right claimed on the name in question Section 19 (2) of the Sunrise Rules states that a prior right claimed to a name included in figurative or composite signs (signs including words, devices, pictures, logos, etc.) will only be accepted if the sign exclusively contains a name or if the word element is predominant, and can be clearly separated or distinguished from the device element, provided that "(a) all alphanumeric characters (including hyphens, if any) included in the sign are contained in the Domain Name applied for, in the same order as that in which they appear in the sign, and (b) the general impression of the word is apparent, without any reasonable possibility of misreading the characters of which the sign consists or the order in which those characters appear". Agora S.A. (hereafter "the Applicant") applied for the domain names AUTOMOTOGAZETA, GAZETA and GAZETAWYBORCZA on February 3, 2006. The processing agent received the documentary evidence on March 8, 2006, which is before the March 15, 2006 deadline. The validation agent concluded from its examination of the documentary evidence that - the Complainant did not appear to have a valid trademark on the name AUTOMOTOGAZETA, as there is no documentary evidence that the trademark is still valid and as the documentary evidence shows that the composite trademark concerns the name AUTO-MOTO GAZETA. - the Complainant did not appear to have a valid trademark on the name GAZETA, as there is no documentary evidence that the trademark is still valid and as the documentary evidence shows that the composite trademark concerns the name GAZETA WYBBORCZA. - the Complainant did not appear to have a valid trademark on the name GAZETA WYBORCZA, as there is no documentary evidence that the trademark is still valid. For those reasons, the Respondent had to reject the application. 2. COMPLAINANT'S CONTENTIONS 2.1 Regarding the domain name AUTOMOTOGAZETA.EU Complainant states that he is the holder of a national registered trademark AUTO-MOTOGAZETA. Further, complainant argues that a hyphen belongs to the category of the special characters listed in article 11 of the regulation, and therefore can be eliminated in the domain name. Therefore, Complainant requests that the Respondent's decision be annulled. 2.2 Regarding the domain name GAZETA.EU Complainant argues that the name GAZETA is a trade name or a business identifier, and that the allowance of the domain name to another person would allow him to use the business position of the domain name gazeta.pl in Poland, and therefore constitute an act of unfair competition. Therefore, Complainant requests that the Respondent's decision be annulled. 2.3 Regarding the domain name GAZETAWYBORCZA.EU Complainant states that he is the holder of a national registered trademark GAZETA WYBORCZA. Therefore, Complainant requests that the Respondent's decision be annulled. 3. RESPONSE 3.1 Regarding the domain names AUTOMOTOGAZETA.EU, GAZETA.EU & GAZETAWYBORCZA.EU: The documentary evidence did not prove that the Complainant's trademarks ware still valid at the time of application. It is important to note that article 14 of the Regulation consistently uses the present tense ("he or she is the holder of the prior right"; "has prior rights"; "does not substantiate a prior right"). The Regulation therefore seems to require that the prior right on which the applicant bases its domain name application exists on the date of assessment by the validation agent It is irrelevant whether the Complainant was once the holder of the AUTO-MOTOGAZETA or GAZETA WYBORCZA

trademarks which are invoked as prior right. The question that must be assessed by the Respondent's validation agent is whether the documentary evidence sufficiently demonstrates that the domain name applicant is the current holder of a prior right on the sign corresponding to the domain name applied for. Article 12 (3) of the Regulation stipulates that the applicant must include any relevant information in the application. This includes either an official renewal certificate or other (more circumstantial) evidence that the trademark has been renewed, as your panel stated in case 219 (ISL.) "The Panel must also refer to the said Regulation Article 12 paragraph 3 which states: “The request to register a domain name based on a prior right under the Article 10(1) and (2) shall include a reference to the legal basis in national or Community law for the right to the name, as well as other relevant information […]”. Such other relevant information are in the Panels opinion – in a case where an official renewal certificate is not available – the above mentioned evidences provided under this ADR proceeding by the Complainant supported by the necessary explanation on how the French Trademark law functions" Notwithstanding the above, the documentary evidence submitted by the complainant consists of documents holding that the trademarks AUTO-MOTOGAZETA and GAZETA WYBORCZA were registered on May 25, 1995. Pursuant to article 13 (3) of the Polish Law on Trademarks of January 13, 1985, the right deriving from registration of a trademark shall last for 10 years. The term of protection for trademarks may be extended for a further 10-year period at the request of the owner of the right deriving from registration. The Complainant does not bring any evidence to the effect that he renewed the concerned trademarks. By consequence, no proof is made that the trademarks were still valid after May 25, 2005. Taking into account the above, the Complainant has not complied with the obligation of Regulation 874/2004 to submit sufficient documentary evidence to demonstrate that it is the holder of a prior right on the AUTO-MOTOGAZETA and GAZETA WYBORCZA trademarks. The Respondent had no other choice that to reject the application. 3.2 The burden of proof is with the Complainant Pursuant to the Regulation and the Sunrise Rules, it is to the applicant to submit all documents which the validation agent needs to assess whether an applicant is the holder of a prior right corresponding to the domain name. In case an applicant fails to submit such documents, its application must be rejected. Pursuant to the texts just mentioned, the relevant question is not whether an applicant is the holder of a prior right, but whether an applicant proves to the validation agent that it is the holder of a prior right. Article 10 (1) of the Regulation states that only the holder of a prior right is eligible to be granted the corresponding domain name. It is therefore of great importance that the Respondent is provided with all information that allows it to assess if the Applicant is the holder of a prior right. A type of prior rights accepted by the Regulation is a registered trademark. Pursuant to article 14 (4) of the Regulation, the documentary evidence must clearly show that the applicant is the holder of the prior right claimed on the name in question. The Panels in cases n° 00119 (NAGEL) and 954 (GMP) clearly stated that article 14 of the Regulation puts the burden with the applicant to prove that it holds a prior right. If an applicant fails to prove that it is the holder of a prior right, the application must be rejected. That the burden of proof is with the applicant is also clear from section 21 (3) of the Sunrise Rules, which states that the validation agent is not obliged, but is permitted in its sole discretion, to conduct its own investigations into the circumstances of the application, the prior right claimed and the documentary evidence produced. Moreover, section 21 (2) of the Sunrise Rules states that the validation agent shall examine whether an applicant has a prior right to the name exclusively on the basis of a prima facie review of the first set of documentary evidence it has received. In case n° 219 (ISL), the Panel agreed that an application must be rejected if an applicant has failed to submit the required documentary evidence: "Having failed to submit such relevant documentary evidence in due time the Panel - based on the presentation of the case under this ADR proceeding - finds that the rejection made by the Respondent of the Complainants application regarding the domain name “ISL.eu” was correct. The above said the Panel concludes that the burden of proof of an existing prior right lies upon the applicant (Complainant) for a domain name under the sunrise periods and neither the validation agent nor the Respondent/Respondent has any obligations to undertake further investigations of the (possible) existence of the prior right claimed in a situation as described under this ADR proceeding where there in the Panels opinion can be no doubt about what documentary evidence is sufficient." The importance of submitting all documentary evidence is mentioned in case n° 294 (COLT), where the Panel stated that: "In this respect, the attention must be drawn on section 21.2 of the Sunrise Rules that expressly state 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. It means that an applicant should not expect the Respondent or Validation agent to engage in speculation and/or embark upon its own enquiry" That the burden of proof is with an applicant has also been accepted in inter alia cases n° 1071 (ESSENCE), 1232 (MCE), 1318 (SYS) and 1710 (EMI et al). It should be clear that the documentary evidence submitted by the Complainant should stand on its own and prove that the Complainant is the holder of a prior right. 3.3 Regarding the Domain Name AUTOMOTOGAZETA.EU and GAZETA.EU Complainant did not apply for the same name that is – not sufficiently – protected by his trademark. For the sake of completeness, and knowing that the complainant is already not fulfilling the requirements to claim the concerned domain name, we will answer his second concern. Complainant brought evidence that, at some point in the time, he was the holder of two composite signs as trademarks. The first sign includes the following characters: AUTO-MOTO GAZETA. The sign includes an hyphen between the two first words. The second sign includes the following characters: GAZETA WYBORCZA. (a) Regarding the domain name AUTOMOTOGAZETA Article 11 of the Regulation states that special characters are to be eliminated from the domain name, or replaced by a hyphen or rewritten. Complainant argues that a hyphen is a special character in the sense of article 11. This is not the case because article 11, at some point, states that any special character must be replaced by an hyphen. This proves very clearly that, in the mind of the drafter of the Regulation, an hyphen must not be considered as an hyphen. Section 19 (2) of the Sunrise Rules, which further clarifies article 11 of the Regulation, also clearly rejects complainant's interpretation, by considering exactly the present hypothesis, i.e. a name included in a composite sign. Section 19 (2) of the Sunrise Rules clearly states that "A prior right claimed to a name included in figurative or composite signs (…) will only be accepted (…) provided that all

alphanumeric characters (including hyphens if any) included in the sign are contained in the Domain Name applied for (…)" There can be no doubt that the domain name does not consist of the complete name of the trademark. Indeed, the complete name includes the hyphen ("-"). To that regard, the Respondent would like to refer the Panel to cases n° 1393 (HANSA), 1053 (SANTOS) and 487 (BENTLEY) were similar situations were before the Panels. All aforementioned decisions clearly state that all alphanumerical characters contained in the prior right must be included in the domain name. Finally, hyphens are ordinarily used in domain names in general, and in .eu domain names in particular. For example, see annex 1 (coca-cola, mc-donalds, pepsi-cola, ralph-lauren, absolut-vodka) As the Applicant applied for the Domain Name AUTOMOTOGAZETA (and not for the AUTO-MOTOGAZETA Domain Name) the Respondent had no other option than to reject the application. (b) Regarding the domain name GAZETA Here, the complainant argues that he is holding a prior right on the domain name GAZETA based on the composite trademark on the sign GAZETA WYBORCZA. Article 19 (2) of the Sunrise rules states clearly that the prior right is only accepted if all the alphanumeric characters included in the sign are contained in the domain name. Clearly, this is not the case here. Therefore, the Respondent had no other choice than to reject the application. 3.4 Regarding the domain name GAZETA.EU: The new documents submitted by the Complainant must be disregarded by the Panel. Concerning this domain name, the complainant submitted new documentary evidence arguing that GAZETA constitutes a trade name or a business identifier. The Respondent would like to note that these documents were not enclosed with the documentary evidence. These documents were provided to the Respondent for the first time in the framework of the present ADR proceedings. Section 21 (2) of the Sunrise Rules however 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. In case n° 294 (COLT), the Panel was confronted with a similar situation. In the COLT case, the complainant claimed to be the licensee of the COLT trademark. Pursuant to section 20 (1) one must file a licence declaration signed by both the licensor and the licensee in order to prove that one is licensed to use a trademark. The licence declaration in the COLT case however was signed by a licensor whose name was similar, both consisted of the word MITSUBITSHI, but nevertheless different from the name mentioned on the COLT trademark. The Respondent decided to reject the complainant's application for the COLT domain name. The Complainant was notified of this rejection and subsequently filed a complaint, with which it enclosed articles of incorporation allegedly showing that the name of the holder of the COLT trademark had changed. The Panel however stated that: "In the present case, the Complainant did not prove the timely substantiation of the Prior Right and a copy of the articles of incorporation, enclosed with the Complaint, was submitted too late to be considered." The Panel in effect stated that the Complainant in that case failed to substantiate that it was properly licensed as it only submitted evidence thereof during the ADR proceedings, whereas it should have filed this evidence with all its documentary evidence. In case n° 219 (ISL), the Panel also stated that an extract from a trademark register showing that the term of protection of the trademark had not yet expired which was filed to the Respondent for the first time in the ADR proceedings, could not be taken into account. In case n° 1549 (EPAGES), the Panel also stated that: "only the documents which the Respondent was able to examine at the time of validation of Complainant's application should be considered by the Panel. In the present case, trademark n° 303 32 267 was not submitted with or referred to in the Documentary Evidence that the Complainant submitted to the Respondent. The Respondent could therefore not take into account this trademark when deciding on the Complainant's domain name application." In case n° 706 (AUTOWELT), the Panel also agreed that: "Finally, it should be made clear that this procedure is not an appeal against Respondent’s decisions whereby the application may be presented afresh to the Panel. The Panel’s function is merely to check that, given the Documentary Evidence, as received on December 16, 2005, in support of the initial application, the Respondent made the appropriate decisions. Should the Panel consider new evidence now, it would treat unfairly any other applicant that may have filed for the Domain Names immediately after the Applicant." This view was also supported by the Panel in case n° 501 (LODE). The Respondent requests the Panel in the case at hand to disregard the new documents as they were submitted for the first time to the Respondent in the framework of the present ADR proceedings. For the sake of completeness, the Respondent would like to add two remarks regarding those new documents. First, the prior right on which the application proceedings for the name GAZETA was based was a trademark of national law (see annex 6), not a trade name. The Complainant filed its application during the first two-months term of the sunrise period which ran from December 7 to February 7, more in particular on February 3. This first term is reserved to the trademarks, geographical indications and names referred to in art. 10 (3) of the Regulation pursuant to art. 12 (2) of the regulation. Secondly, the evidence brought in this ADR proceeding by the Complainant concerns the "gazeta.pl" brand, and not the "gazeta" brand (see annexes 3 to 5 of the Complaint.). Any application based on such a right should have included the ".pl" extension pursuant to section 19(5) of the Sunrise Rules. For all those reasons mentioned above, the complaint must be rejected.

DISCUSSION AND FINDINGS

1. APPLICATION FOR THE DOMAIN NAMES AUTOMOTOGAZETA.EU, GAZETA.EU and GAZETAWYBORCZA.EU BY AGORA, S.A.

To this regard, all applicants must be aware of Art. 10 (1) of Commission Regulation (EC) no 874/2004 of 28 April 2004 (hereinafter, the “Regulation”) stating 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.

Likewise, Art. 12 (3) of the Regulation provides that the request to register a domain name based on a prior right shall include a reference to the legal basis in national or Community law for the right to the name, such as a trademark, as well as other relevant information, such as trademark registration number. Art. 14 (4) of the Regulation states that every applicant must submit documentary

evidence that shows that he or she is the holder of the prior right claimed on the name in question. Lastly, Section 19 (2) of the Sunrise Rules states that a prior right claimed to a name included in figurative or composite signs (signs including words, devices, pictures, logos, etc.) will only be accepted if the sign exclusively contains a name or if the word element is predominant, and can be clearly separated or distinguished from the device element, provided that "(a) all alphanumeric characters (including hyphens, if any) included in the sign are contained in the Domain Name applied for, in the same order as that in which they appear in the sign, and (b) the general impression of the word is apparent, without any reasonable possibility of misreading the characters of which the sign consists or the order in which those characters appear".

This Panel must say that Agora, S.A. (hereinafter, the "Applicant") applied for the domain names in question and the validation agent received the documentary evidence before the deadline.

The conclusions derived from the examination of the documentary evidence carried out by the Validation Agent are clearly itemized by the Respondent in its response to the complaint in question. Basically the Respondent rejected the application since there was no documentary evidence proving that the Complainant had a valid trademark on the names in question and there was neither any documentary evidence that the trademarks were still valid and as the documentary evidence shows that the marks concern the respective names in question.

2.1. REGARDING THE DOMAIN NAMES AUTOMOTOGAZETA.EU, GAZETA.EU AND GAZETAWYBORCZA.EU

First of all it is important to note that it seems that the Applicant did not furnish all the required documentary evidence in order to prove that indeed the Complainant trademark was still valid at the time of the application. It's necessary to prove that AT THE TIME OF THE APPLICATION the trademark is still valid. It's a very frequent practice amongst many applicants that they often furnish documentation evidencing a former period of validity of their trademark but yet they omit the literal tenor of the relevant rule. Art. 14 of the Regulation uses the present tense ("he or she is the holder of the prior right", etc.). This is exactly what occurs in the case herein. The applicant indeed demonstrates that once was the holder of the AUTOMOTOGAZETA or GAZETAWYBORCZA trademarks but not at the moment of the application. And therefore we must acknowledge that the Validation Agent cannot presuppose that since the applicant was the holder of a prior right -as resulting from the documentary evidence- in the past, he still holds said right in the moment of the application. To this regard it is important to note that the term of protection for trademarks can vary depending on each country's legislation. As affirmed by the Respondent, Polish Law on Trademarks provides that the right deriving from registration of a trademark lasts for 10 years and can be extended for a further 10-year period at the request of the owner. But no evidences about said request were provided by the Complainant, if we keep in mind that the trademarks AUTOMOTOGAZETA and GAZETAWYBORCZA were registered on May 25, 1995.

This Panel wants to remark the importance of providing all the relevant documentary evidence. It is only on it that the Validation Agent and the Registry will base their decision whether to accept or reject the application. Therefore, it is essential to submit all documentary evidence. To this regard, cases nº 294 (COLT), nº 1071 (ESSENCE), nº 1232 (MCE), etc., reaffirm how important it is to meet this provision.

2.2. THE BURDEN OF PROOF

The Sunrise Rules leave it clear that the applicant must submit all the documents that are needed for the Validation Agent so as to assess whether the applicant is the holder of the prior right corresponding to the domain name. We likewise can refer to Art. 10 (1) and Art. 14 (4) of the Regulation.

This Panel must say that the Validation Agent cannot "suppose", "presuppose", etc. that the Applicant was indeed the holder of a prior right corresponding to the domain name. That would establish a non-desirable precedent both for the applicants as for the Registration bodies. In fact, the Regulation does not provide any case where an exception can be made in the egalitarian application of the relevant provisions.

2.3 REGARDING THE DOMAIN NAME AUTOMOTOGAZETA.EU AND GAZETA.EU

It seems that the Complainant did not apply for the same name that is protected by "his" trademark.

Indeed, the Respondent argues that the Complainant proved that he used to be the holder of two composite signs as trademarks, "AUTO-MOTO GAZETA" and "GAZETA WYBORCZA".

a) Regarding the domain name AUTOMOTOGAZETA.EU

To this regard it is important to attend to the regulation. Art. 11 states that special characters are to be eliminated from the domain name, or replaced by a hyphen or rewritten. Complainant argues that a hyphen is a special character in the sense of article 11.

The respondent, on the contrary, denies that by mentioning art. 11 stating that any special characters must be replaced by a hyphen. Not in vain, the Respondent uses logics as a ground to affirm that a hyphen therefore must not be considered as a hyphen in the mind of the drafter of the Regulation. In fact, it has recourse to Section 19 (2) of the Sunrise Rules, that clarifies art. 11 of the Regulation, which clearly rejects the Complainant's construction.

b) Regarding the domain name GAZETA.EU

The documents submitted by the Complainant were not enclosed with the documentary evidence. To make matters worse, they were provided in the framework of the present ADR proceeding.

Again, this Panel refers to the Sunrise Rules (Section 21 [2]) clearly stating 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.

In the case at hand this Panel considers that new documents that are submitted for the first time in the framework of the present ADR Proceeding must be disregarded.

In fact, regarding those new documents, the prior right on which the application proceedings for the name GAZETA was based was a trademark of national law and not a trade name, as alleged by the Respondent.

Also, the first two-month term of the sunrise period (from December 7 to February 7) is reserved to the trademarks, geographical indications and names referred to in art. 10 (3) of the Regulation pursuant to art. 12 (2) of the Regulation. And Complainant filed his application on February 3, that is, within this period.

Lastly, this Panel does not want to ignore the fact that the evidence brought in this ADR proceeding by the Complainant concerns the "gazeta.pl" brand and not the "gazeta" brand. It's suitable to make this clarification. The application should have included the ".pl" extension pursuant to section 19(5) of the Sunrise Rules.

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	**Enrique Batalla**

DATE OF PANEL DECISION 2006-09-14

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

1. APPLICATION FOR THE DOMAIN NAMES AUTOMOTOGAZETA.EU, GAZETA.EU and GAZETAWYBORCZA.EU BY AGORA, S.A.

Agora, S.A. (hereinafter, the "Applicant") applied for the domain names in question and the validation agent received the documentary evidence before the deadline.

The conclusions derived from the examination of the documentary evidence carried out by the Validation Agent are clearly itemized by the Respondent in its response to the complaint in question. Basically the Respondent rejected the application since there was no documentary evidence proving that the Complainant had a valid trademark on the names in question and there was neither any documentary evidence that the trademarks were still valid and as the documentary evidence shows that the marks concern the respective names in question.

2.1. REGARDING THE DOMAIN NAMES AUTOMOTOGAZETA.EU, GAZETA.EU AND GAZETAWYBORCZA.EU

The Applicant did not furnish all the required documentary evidence in order to prove that indeed the Complainant trademark was still valid at the time of the application. The applicant indeed demonstrates that once was the holder of the AUTOMOTOGAZETA or

GAZETAWYBORCZA trademarks but not at the moment of the application. The Validation Agent cannot presuppose that since the applicant was the holder of a prior right in the past, he still holds said right in the moment of the application. The term of protection for trademarks can vary depending on each country's legislation. Polish Law on Trademarks provides that the right deriving from registration of a trademark lasts for 10 years and can be extended for a further 10-year period at the request of the owner. But no evidences about said request were provided by the Complainant, if we keep in mind that the trademarks AUTOMOTOGAZETA and GAZETAWYBORCZA were registered on May 25, 1995.

2.2. THE BURDEN OF PROOF

The applicant must submit all the documents that are needed for the Validation Agent so as to assess whether the applicant is the holder of the prior right corresponding to the domain name.

The Validation Agent cannot "suppose", "presuppose", etc. that the Applicant was indeed the holder of a prior right corresponding to the domain name. In fact, the Regulation does not provide any case where an exception can be made in the egalitarian application of the relevant provisions.

2.3 REGARDING THE DOMAIN NAME AUTOMOTOGAZETA.EU AND GAZETA.EU

The Complainant did not apply for the same name that is protected by "his" trademark.

a) Regarding the domain name AUTOMOTOGAZETA.EU

To this regard it is important to attend to the regulation. Art. 11 states that special characters are to be eliminated from the domain name, or replaced by a hyphen or rewritten. Complainant argues that a hyphen is a special character in the sense of article 11.

The respondent, on the contrary, denies that by mentioning art. 11 stating that any special characters must be replaced by a hyphen. Not in vain, the Respondent uses logics as a ground to affirm that a hyphen therefore must not be considered as a hyphen in the mind of the drafter of the Regulation. In fact, it has recourse to Section 19 (2) of the Sunrise Rules, that clarifies art. 11 of the Regulation, which clearly rejects the Complainant's construction.

b) Regarding the domain name GAZETA.EU

The documents submitted by the Complainant were not enclosed with the documentary evidence. To make matters worse, they were provided in the framework of the present ADR proceeding.

Again, this Panel refers to the Sunrise Rules (Section 21 [2]) clearly stating 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.

Also, the first two-month term of the sunrise period (from December 7 to February 7) is reserved to the trademarks, geographical indications and names referred to in art. 10 (3) of the Regulation pursuant to art. 12 (2) of the Regulation. And Complainant filed his application on February 3, that is, within this period.

The evidence brought in this ADR proceeding by the Complainant concerns the "gazeta.pl" brand and not the "gazeta" brand. It's suitable to make this clarification. The application should have included the ".pl" extension pursuant to section 19(5) of the Sunrise Rules.