Panel Decision for dispute CAC-ADREU-002257

Case number	CAC-ADREU-002257
Time of filing	2006-07-11 11:13:41
Domain names	live.eu

Case administrator

Name	Kateřina Fáberová

Complainant

Organization / Name	Multam BV

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

ADR case 265 (decided).

ADR case 02990 (not yet decided when this decision was taken).

Complainant writes that it recently launched another ADR against the decision of EURid to accept Microsoft application. (see non standard comm., dated 2006-07-11).

FACTUAL BACKGROUND

Complainant is the holder of a trademark (LI&VE). Based on this trademark, it applied during the Sunrise 1 period for the following domain name: live.eu. This application was the first in line and the Complainant was granted the domain name.

Another company (Microsoft) applied for the same domain name and was ranked # 2.

Microsoft launched an ADR against Eurid's decision to grant the domain name to the Complainant. This ADR raised the issue of the transliteration of the Complainant's trademark into a domain name under article 11 of EC Regulation 874/2004, and it ended against the Complainant. The decision of Eurid to grant the domain name to the actual Complainant was annulled.

The Panel in this first ADR didn't provide for any measure concerning the domain name; it only annulled Eurid's decision.

The next step is unclear.

Based on Complainant's assertion, Eurid first refused to register the domain name in the name of Microsoft, and changed its mind later on (i.e., after the Complainant launched the actual ADR).

Respondent answers that "contrary to the Complainant's assertion, the application by "Microsoft B.V." is not rejected, but accepted. This is clearly established by the WHOIS database".

It is unclear whether or not Eurid first refused and then accepted Microsoft's application, but as a matter of fact, the Whois? Database clearly indicates today that the domain name is registered in the name of Microsoft.

A. COMPLAINANT

The Complainant "requests the panel to annul the decision of EURid to reject the application of Microsoft B.V. and simultaneously annul

the decision of EURid to reject the application of Multam BV. Thereafter, Multam BV requests the panel to transfer the domain name live.eu to Multam B.V."

Complainant's view is that:

(begin of quote)

"Complainant has fulfilled all formal requirements to be awarded the Domain Name. Consequently, EURid's decision to reject Complainant's application conflicts with Regulation 784/2004.

EURid's decision to reject the application of Microsoft B.V. conflicts with Regulation 784/2004 as well. The Domain Name should have been awarded to Complainant. EURid, therefore, was not entitled to take a decision with respect to the question whether or not the Domain Name should be registered in the name of the applicant second in line, Microsoft B.V..

Complainant therefore requests the panel to annul the decision of EURid to reject the application of Microsoft B.V. and simultaneously annul the decision of EURid to reject the application of Complainant. Thereafter, Complainant requests the panel to transfer the domain name live.eu to Complainant.

To the extent that the panel does not issue a decision granting the remedies requested, Complainant subsequently requests the panel to confirm EURid's rejection of the application of Microsoft B.V."

B. RESPONDENT

Respondent underlines that the object of the present ADR proceedings must be limited to the question whether there is a decision by the Respondent rejecting the Complainant's applications. The merits of the decision in ADR 265 (LIVE) (i.e. the Panels' understanding of article 11 of the Regulation) are not within the scope of the present ADR proceedings.

Respondent contends that it did not take the decision to reject the Complainant's applications, let alone that there could be such a decision which could conflict with the applicable regulations. The decision to reject the Complainant's application was made by the Panel in ADR 265 (LIVE).

Moreover, the Respondent writes that it may not be in breach of the Regulation, since it must implement ADR decisions.

Concerning the application by Microsoft B.V., Respondent contends that contrary to the Complainant's assertion, the application by "Microsoft B.V." is not rejected, but accepted. Therefore, the Complainant's request with regard to the Respondent's decision to reject the application by "Microsoft B.V." is without object and should be dismissed.

DISCUSSION AND FINDINGS

Pursuant to article 22 of EC Regulation, an ADR may be initiated "by any party where: (a) … (b) a decision taken by the Registry conflicts with this Regulation or with Regulation (EC) No 733/2002".

There are thus three conditions for a successful ADR under article 22 (b):

1. A decision.

2. The decision must be taken by the Registry.

3. Said decision must conflicts with Regulation.

The question is whether or not the implementation of the Panel decision in the Live case (ADR 265) is, or not, a decision taken by the Registry?

oOo

Before assessing the case, it is worth recalling that an ADR decision in a procedure against the Registry is divided into two separate

parts. This division derives from article 22, 10, of EC Regulation 874/2004:

(begin of quote)

In the case of a procedure against the Registry, the ADR panel shall decide whether a decision taken by the Registry conflicts with this Regulation or with Regulation (EC) No 733/2002.

The ADR panel shall decide that the decision shall be annulled and may decide in appropriate cases that the domain name in question shall be transferred, revoked or attributed, provided that, where necessary, the general eligibility criteria set out in Article 4(2)(b) of Regulation (EC) No 733/2002 are fulfilled.

(end of quote)

- Part 1 of the decision: is Eurid's decision annulled?

This first part concerns the merits of the initial application: did Eurid correctly apply the Regulation when it took its decision concerning the initial application? Pursuant to article 22, 10, part 1 is compulsory: the Panel SHALL DECIDE [we emphasize] …".

- Part 2: if the decision is annulled, who gets the domain name?

Depending on the facts of the case, the Panel may also order measures related to the "ownership" of the domain name. Pursuant to article 22, 10, part 2 is optional: "the Panel … MAY DECIDE [we emphasize] in appropriate cases that the domain name in question shall be …".

oOo

In the Panel view, it is unreasonable to pretend that the implementation of the first part of a Panel decision is a "decision taken by the Registry", or that "this decision conflicts with the Regulation".

Let's take things the other way: if one considers the annulment of the Registry's decision by the Panel, as a decision taken by the Registry itself that any party could challenge in another ADR, the second ADR would be an appeal against the first ADR Panel decision and this in not acceptable under applicable Regulations.

It would also create an endless circle: the second ADR would then be a new decision taken by the Registry; any party could challenge it, and so on ….

The question is slightly different as far as the second part of the Panel decision is concerned.

When the Panel decides measures in respect of article 20, 10, of Regulation (transfer, revocation or attribution of the domain name – see here above), the situation is the same as for the first part of the decision. The implementation of the measures is not a decision taken by the Registry.

When the Panel is silent (part 2 is indeed optional – see here above), then there can be a decision taken by the Registry.

Depending on the situation (Sunrise or Land Rush, one or many applicant for the domain name, etc.), the Registry must apply the Regulation and if it doesn't, any party may launch an ADR.

oOo

In the present case, the purpose of the complaint is to challenge the first part of the Panel decision in the Live case (ADR 265).

First evidence of this, is that based on a comprehensive analysis of the Regulation, the Complainant tries to demonstrate that the Panel in case 265 interpreted badly article 11 of the Regulation.

Another evidence of this, is that even if the Complainant formally challenges the decision of Eurid to accept/reject Microsoft's application, it does it only as a consequence of the fact that the first Panel took, in the Complainant's view, a bad decision (quote: "EURid's decision to reject the application of Microsoft B.V. conflicts with Regulation 784/2004 as well. The Domain Name should have been awarded to Complainant. EURid, therefore, was not entitled to take a decision with respect to the question whether or not the Domain Name should be registered in the name of the applicant second in line, Microsoft B.V.").

For the reasons set up here above, the Panel may not accept to reopen the Live case.

This conclusion is not an approval or a rejection by the actual Panel of the solution provided for in the Live case; it is the inevitable consequence of the fact that a previous Panel annulled Eurid's decision, and that the actual Panel may not, and shall not, reopen the debate on the merits of the Complainant initial application. As far as ADR is concerned, this debate has been closed by the annulment of Eurid's decision.

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	**Etienne Wery**

DATE OF PANEL DECISION 2006-10-31

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The question is whether or not the implementation of a Panel decision taken previously in a procedure against the Registry is, or not, a decision taken by the Registry that any party may challenge under article 22,10 of EC Regulation 874/2004?

In an ADR decision in a procedure against the Registry is divided into two separate parts. This division derives from article 22, 10, of EC Regulation 874/2004:

- Part 1 of the decision: is Eurid's decision annulled?

This first part concerns the merits of the initial application: did Eurid correctly apply the Regulation when it took its decision concerning the initial application? Pursuant to article 22, 10, part 1 is compulsory: the Panel SHALL DECIDE [we emphasize] …".

- Part 2: if the decision is annulled, who gets the domain name?

Depending on the facts of the case, the Panel may also order measures related to the "ownership" of the domain name. Pursuant to article 22, 10, part 2 is optional: "the Panel … MAY DECIDE [we emphasize] in appropriate cases that the domain name in question shall be …".

After a careful analysis of the Complainant, the Panel reached the conclusion that this complaint is directed against the first part of the Panel decision in case ADR 265 (LIVE).

In the Panel view, it is unreasonable to pretend that the implementation of the first part of a Panel decision is a "decision taken by the Registry", or that "this decision conflicts with the Regulation".

Let's take things the other way: if one considers the annulment of the Registry's decision by the Panel, as a decision taken by the Registry itself that any party could challenge in another ADR, the second ADR would be an appeal against the first ADR Panel decision and this in not acceptable under applicable Regulations.

It would also create an endless circle: the second ADR would then be a new decision taken by the Registry; any party could challenge it, and so on ….