Panel Decision for dispute CAC-ADREU-002925

Case number	**CAC-ADREU-002925**
Time of filing	**2006-09-01 12:45:36**
Domain names	**m2.eu**

Case administrator

Name	**Tereza Bartošková**

Complainant

Organization / Name	**M2 Marketing A/S, Mr. Erik Madsen**

Respondent

Organization / Name	**EURid**

FACTUAL BACKGROUND

On February 7, 2006, at 11:21:29.517 the Complainant filed an application for the registration of the domain name <m2.eu> during Phase II of the phased registration period. This application is subject to the Commission Regulation (EC) No 874/2004 of 28 April 2004 (“Public Policy Rules”) and the .eu Registration Policy and Term and Conditions for Domain Name Applications made during the Phased Registration Period (the “Sunrise Rules”).

The Complainant’s Application was rejected by the Respondent. Subsequent to rejecting the Complainant’s Application, the Respondent reviewed the next application in the queue for the domain name <m2.eu> filed by M2 Stockholm AB on February 7, 2006 at 13:09:38:384 and accepted this latter application. Accordingly, the disputed domain name <m2.eu> is currently registered to M2 Stockholm AB. (M2 Stockholm AB is hereinafter referred to as the “Current Registrant”)

The Complainant submitted its Complaint under the .eu Alternative Dispute Resolution Rules (“ADR Rules”) by email on August 28, 2006, and in hardcopy on September 14, 2006. The Complaint was in the Swedish language. According to Article 16.3 of the .eu Domain Name Registration Terms and Conditions (the “.eu Terms and Conditions”), any ADR Procedure initiated against the Registry shall be conducted in the English language. Accordingly, on September 8, 2006, the ADR Center issued a Notification of Deficiency in the Complaint and requested the Complainant to, inter alia, submit the Complaint in the proper language of the proceeding, namely the English language. On September 12, 2006, the Complainant submitted its Complaint in the English language.

On September 14, 2006, the ADR Center formally notified the Respondent of the Complaint and the commencement of the ADR proceeding. The Respondent submitted its Response on October 25, 2006.

Pursuant to Article 4 of the ADR Rules, the ADR Center contacted the Undersigned requesting his services as a sole Panelist to consider and decide this dispute. The Undersigned having accepted, signed and sent his Statement of Acceptance and Declaration of Impartiality, on October 31, 2006, the ADR Center appointed the Undersigned.

After having reviewed the case file, the Panel issued an order on November 20, 2006, requesting the Respondent to disclose the Documentary Evidence submitted by the Complainant, M2 Marketing A/S, in its application for the domain name

<m2.eu>. On the same day, the Respondent disclosed the requested Documentary Evidence.

A. COMPLAINANT

The Complainant requests transfer of the disputed domain name <m2.eu> to the Complainant.

The Complainant asserts as follows as a basis for such transfer request:

(1) The Complainant's application preceded the Current Registrant's application.
(2) The Complainant offers marketing services in several European countries.
(3) The Complainant has used the domain name <m2.dk> until August 26, 2006, when the domain name was sold to a new owner "as part of a business transaction."
(4) The Current Registrant's operations are limited to Sweden and do not extend to other European countries.

The Complainant submitted, inter alia, copies of the following extracts from the Danish Register of Trademarks: Registration No. VR 2001 03206 for "M2 Marketing" registered to the Complainant, M2 Marketing AS, and Registration No. VR 2001 04866 for "M2 Software" registered to M2 Software ApS.

B. RESPONDENT

The Respondent's Response may be summarized as follows:

(1) The Complainant's Application was submitted prior to the Current Registrant's application. The former Application was rejected as "the documentary evidence submitted by the Complainant failed to prove that the Complainant was the holder of a prior right on the sign M2."
(2) "The Regulation does not require an undertaking to offer services/products in several Member states." The Current Registrant "has its registered office in Sweden and is thus eligible to register domain names under the .eu TLD."
(3) "Domain names cannot be accepted as prior rights pursuant to article 10(1) of the Regulation which provides" a list of prior rights, as confirmed in decisions ADR 1262 <nationalbank.eu> and ADR 1375 <rabbin.eu>.
(4) Article 11(c) of the ADR Rules provide for two conditions for a request for transfer and attribution to be granted by the Panel, namely that the Complainant should be the next applicant in the queue, and the Registry finds that the Complainant satisfied all registration criteria set out in the Regulation. The Complainant does not meet these conditions as its Application was rejected and the Complainant has not filed a new application to be in the queue.

DISCUSSION AND FINDINGS

The Complaint is filed against the Registry for its decision to register the disputed domain name <m2.eu> to the Current Registrant, M2 Stockholm AB, applied for during the phased registration period.

Paragraph B11(d) of the ADR Rules states that "[t]he Panel shall issue a decision granting the remedies requested under the Procedural Rules in the event that the Complaint proves […] (2) In ADR Proceedings where the Respondent is the Registry that the decision taken by the Registry conflicts with the European Union Regulations." Article 14 of Public Policy Rules on "Validation and registration of application received during phased registrations" states that "[…] The Registry shall register the domain name, on the 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."

The Panel shall examine whether or not the Registry's decision to register the disputed domain name was in accordance with the Regulations.

First Come First Served Basis

The Complainant states it "has applied for the domainname [sic] www.m2.eu on February 7th 2006 at 11.21.29. The registrar [sic] first applied at 13.09.38 the same day. … The complaintant [sic] has therefore applied before the registrar [sic]."

The Complainant appears to imply that he has rights in the disputed domain name as its application preceded that of the Current Registrant's. Article 14 of the Public Policy Rules states "If the Registry receives more than one claim for the same domain during the phased registration period, applications shall be dealt with in strict chronological order." The Registry complied with this provision and examined the Complainant's application before that of the Current Registrant's. The Registry, however, rejected the Complainant's application for having insufficiently proven that the Complainant is the holder of a prior right in "M2". The Complaint before this Panel is not strictly in relation with the Registry's decision to reject the Complainant's application. The date before which an ADR procedure against such decision of the Registry can be initiated was July 28, 2006. It does not appear from the record before the Panel that an ADR or court procedure was initiated during this period.

In accordance with Article 14 of the Public Policy Rules, the Registry subsequently examined and accepted the Current Registrant's application which was next in queue.

The Panel finds that the Registry complied with the obligation to deal the applications in strict chronological order.

Prior rights

The Panel shall proceed to examine the Registry's decision to register the disputed domain name in the name of the Current Registrant.

The relevant provisions are:

Article 10.1 of the Public Policy Rules, which states that "'Prior rights' shall be understood to include, inter alia, registered national and community trademarks, geographical indications or designations of origin […]."

The documentary evidence submitted by the Current Registrant demonstrates that M2 Stockholm AB, the Current Registrant of the disputed domain name <m2.eu>, is the registrant of the mark "m2", registered with the Swedish Trademark Office (No. 0377816) on January 5, 2006. The Panel agrees with the Registry's finding that the Current Registrant has demonstrated a prior right as required by the Public Policy Rules.

The Complainant appears to argue that the Current Registrant's activities are limited to Sweden and therefore the Current Registrant lacks rights to a domain name in the <.eu> TLD. Article 14 of the Public Policy Rules states that "Holder of prior rights recognised and established by national and/or Community law and public bodies shall be eligible to apply to register domain names during a period of phased registration before general registration of .eu domain starts." There is no requirement in the Public Policy Rules that the prior right be exercised in more than one Member State.

Accordingly, the Panel finds that the Respondent correctly concluded in its determination to register the disputed domain name to the Current Registrant. The Panel finds that the Respondent's decision in question does not conflict with the .eu Regulation and the Public Policy Rules.

As the Complainant requests transfer of the disputed domain name to itself, for the sake of completeness, the Panel notes that the Panel is unable to conclude, on the basis of the evidence submitted in this Complaint, that the Complainant demonstrated a prior right as required by the Public Policy Rules. The complete names of the rights claimed in the evidence are "M2 Holding ApS", "M2 Marketing". None of them correspond exactly to "M2". The Complainant also asserts a prior right on the basis of its previous ownership of the domain name <m2.dk>. The Panel finds that (prior) ownership of a domain name, the second level of which corresponds to that of the disputed domain name is per se insufficient to assert a prior right under Article 10 of the Public Policy 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	**Felipe Lorenzo**

DATE OF PANEL DECISION 2006-11-26

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complaint has been filed against the Registry for its decision to register the disputed domain name <m2.eu> to the Current Registrant, M2 Stockholm AB, applied for during the phased registration period.

The Panel finds that the Registry complied with the obligation to deal the applications in strict chronological order, as it has rejected the Complainant's application for having insufficiently proven that the Complainant is the holder of a prior right in "M2". The Panel agrees with the Registry's finding that the Current Registrant has demonstrated a prior right as required by the Public Policy Rules.

The Panel orders that the Complaint is denied.