Panel Decision for dispute CAC-ADREU-003654

Case number	**CAC-ADREU-003654**
Time of filing	**2006-11-06 13:16:35**
Domain names	**nedvast.eu**

Case administrator

Name	**Tomáš Paulík**

Complainant

Organization / Name	**NedVast B.V, ir. Roel Mühlstaff**

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

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FACTUAL BACKGROUND

Complainant filed the complaint in connection with the domain name nedvast.eu which was received by Arbitration Court November 6, 2006. Respondent have been notified. A domain name application nedvast.eu with the priority right was filed by Complaint on February 9, 2006. Respondent rejected to grant the domain name to Complainant. The decision of the Respondent is a subject to this complaint.

A. COMPLAINANT

Complainant is of the opinion that the domain name nedvast.eu must be granted to the Complainant, because it fulfilled all the requirements for the prior right domain registration based on the protected trade name in the EU member state since it proved the prior right by submitting the extract from the official register, mentioning the date on which the trade name was registered and a proof of public use of the trade name or business, prior to the date of application. The respective documentary evidence is attached to the Complaint.

To support its opinion, Complainant argues with the applicable .eu Sunrise Rules 16(1),(2) and (5) as well as the Article 10 and 14 of the EC Regulation 733/2002.

Complainant is of opinion that the Respondent’s decision is not in compliance with the relevant legislation and asks the panel to annul the disputed decision. Furthermore Complainant asks the panel again to attribute the domain name nedvast.eu to Complainant.

B. RESPONDENT

The Respondent firstly explains the grounds on which it rejected the application of Complainant for the domain name nedvast.eu. The Respondent describes the documentary evidence received by processing agent on March 1, 2006 (which is within the 40 days period according to Article 14 of EC Regulation 874/2004) consisting of a certificate of registration from the official register and a cover letter signed by the manager of Respondent. The 40 days period lapsed on March 21, 2006. Based on the documentary evidence received within the deadline, the validation agent found that the Complainant did not demonstrate that the claimed prior right is established and protected in the Netherlands because no proof of public use in the course of trade was provided. Therefore, the Respondent rejected the Complainant's application. The Respondent argues that the Respondent and the validation agent may consider as documentary evidence only the documents that are received by the validation agent within 40 days from the submission of the application. The set of documentary evidence attached to the non standard communication dated 9 November 2006 has been mistakenly provided to this Panel as documentary evidence because these documents were received on 29 March 2006, which is after the 21 March 2006 deadline as established by the WHOIS database. The fact that those documents were not considered as documentary evidence because they were

received after the deadline is established by the date stamped on the side of the scanned documents (2006-03-29) as well as by the letter which is dated 23 March 2006. The Complainant also attaches documents to its complaint filed on 6 November 2006.

These documents may not serve as documentary evidence, since those documents are submitted after the end of 40 days period set forth by the Regulation.

Accepting these documents or any other documents received after the deadline as documentary evidence would clearly violate the Article 14 of EC Regulation 874/2004.
Therefore, the validation agent and the Respondent only considered the set of documents received on 1 March 2006.

To support its decision the Respondent draws to panel's attention ADR cases 127 (BPW), 219 (ISL), 294 (COLT), 551 (VIVENDI), 984 (ISABELLA), 843 (STARFISH), 1931 (DIEHL, DIEHLCONTROLS), 2350 (PUBLICARE), 2881 (MRLODGE), 1886 (GBG), 954 (GMP), 1549 (EPAGES), 1674 (EBAGS), 2124 (EXPOSIUM), 706 (AUTOWELT), 954 (GMP), 551 (VIVENDI), 810 (AHOLD), 1194 (INSURESUPERMARKET), 1627(PLANETINTERNET), 3593 (CENTRIC), and 2957 (GAYROMEO).

DISCUSSION AND FINDINGS

The complaint of the Complainant as well as the Respondent's response was duly reviewed.

Article 10 (1) of EC Regulation 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 14 of the Regulation states that " (…) Every applicant shall submit documentary evidence that shows that he or she is the holder of the prior right claimed on the name in question. The documentary evidence shall be submitted to a validation agent indicated by the Registry. The applicant shall submit the evidence in such a way that it shall be received by the validation agent within forty days from the submission of the application for the domain name. If the documentary evidence has not been received by this deadline, the application for the domain name shall be rejected..(…)".

Section 16 (5) of the Sunrise Rules states that: "Unless otherwise provided in Annex 1 hereto, it is sufficient to submit the following Documentary Evidence for trade names and business identifiers referred to in Section 16(2) respectively 16(3):
(i) where it is obligatory and/or possible to register the relevant trade name or business identifier in an official register (where such a register exists in the member state where the business is located):
a. an extract from that official register, mentioning the date on which the trade name was registered; and
b. proof of public use of the trade name or business identifier prior to the date of Application (such as, but not limited to, proof of sales volumes, copies of advertising or promotional materials, invoices on which the trade name or business identifier is mentioned etc., proving public use of the name in the relevant member state); (…)".

Article 22 (1) b of the Regulation states that a decision taken by the Respondent may only be annulled when it conflicts with the Regulation.

The Complainant in its Complaint refers to the prior right connected with the trade name, however pointing also to the Section 16(1) of the Sunrise Rules - between others – which describes prior right connected with the company name but the Complainant did neither mention Section 16(4) nor provided the relevant documentary evidence. I assumed that the Complainant did not apply for the priority right in connection with the company name. The Complainant applied for the priority right in connection with the trade name solely according to Section 16(2) of the Sunrise Rules.

The reference to the Articles 10 and 14 of the EC Regulation 733/2002 in the Complaint made by the Complainant is understood as the reference to the Articles 10 and 14 of the Regulation.

The Complainant sent the documentary evidence to the processing agent in two sets:

- first set of documentary evidence (according to Section 16(5)(i)a. of the Sunrise Rules) consisting of a certificate of registration from the official register and a cover letter signed by the Director of Complainant on February 26, 2006 and received by the processing agent on March 1, 2006 (which is within the 40 days period according to Article 14 of the Regulation).

- second set of documentary evidence (according to Section 16(5)(i)b. of the Sunrise Rules) consisting of a leaflet EPE and the visit cards with the trade name and a cover letter signed by the Director of Complainant on March 23, 2006 and received by the processing

agent on March 29, 2006 (which is out of the 40 days period according to Article 14 of the Regulation).

According to the procedure laid out in the Regulation the relevant question is not whether the Complainant is the holder of a prior right, but whether the Complainant demonstrated to the validation agent that it is the holder of a prior right within the prescribed period.

Based on the documentary evidence received within the deadline, the validation agent found that the Complainant did not demonstrate that the claimed prior right is established and protected in the Netherlands because no proof of public use in the course of trade was provided.

In my opinion, the content of the Complaint as well as the Response and the Nonstandard Communication together with the attached documentation clearly shows that the Complainant did not recognised that the 40 days period for the submission of the documentary evidence lapsed on March 21, 2006. This fact is, however the key element of the dispute.

Summarizing the above stated, also bearing in mind the decisions made by panels of this Court, I did not find the contested decision to reject the application of the Complainant made by the Respondent in conflict with any of the European Union Regulations.

DECISION

For all the foregoing reasons, in accordance with Paragraphs B12 (b) of the Rules, the Panel orders that

the Complaint is Denied

PANELISTS

Name	**Tomáš Borec**

DATE OF PANEL DECISION 2007-02-12

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

Complainant is of opinion that the Respondent's decision is not in compliance with the relevant legislation and asks the panel to annul the disputed decision. Furthermore Complainant asks the panel again to attribute the domain name nedvast.eu to Complainant.

The Panel reviewed the arguments of Complainant as well as Respondent and found no breach of any of the European Union Regulations in the Respondents decision.

Respondent rejected the registration of the domain name nedvast.eu in favour of Complainant since the Complainant did not meet the requirements set by the Article 14 of EC Regulation 874/2004 as well as Section 16(5) in connection with the Section 16(2) of .eu Sunrise Rules.
In more detail, the documentary evidence (according to Section 16(5)(i)b of the Sunrise Rules) have been signed by the Director of Complainant on March 23, 2006 and received by the processing agent on March 29, 2006, which is out of the 40 days period according to Article 14 of the Regulation and which lapsed on March 21, 2006.

According to the procedure laid out in the EC Regulation 874/2004 the relevant question is not whether the Complainant is the holder of a prior right, but whether the Complainant demonstrated to the validation agent that it is the holder of a prior right within the prescribed period.

Based on the documentary evidence received within the deadline, the validation agent found that the Complainant did not demonstrate that the claimed prior right is established and protected in the Netherlands because no proof of public use in the course of trade was provided.

The Panel denied the complaint.