Panel Decision for dispute CAC-ADREU-003802

Case number	**CAC-ADREU-003802**
Time of filing	**2006-11-30 14:33:08**
Domain names	**flycheap.eu**

Case administrator

Name	**Tereza Bartošková**

Complainant

Organization / Name	**EuroHealth B.V., Johannes A.G. de Groot**

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 other legal proceedings realted to the disputed domain name.

FACTUAL BACKGROUND

3 April 2006 the Complainant filed for the registration of the domain name flycheap.eu in the Sunrise 2 period claiming a prior right to the name in the nature of a trade name.

The Validation Agent received the documentary evidence on 3 May 2006, which was before the 13 May 2006 deadline – hence it was in due time. The documentary evidence consisted of an official extract from the relevant company register and a company stationary (writing paper) showing the name of the Complainant and the trade name.

20 October 2006 the Respondent rejected the Application on the ground that the Complainant, according to Respondent, did not submit sufficient proof of public prior use.

28 November 2006 the Complainant in due time filed a Complaint against this decision.

A. COMPLAINANT

Complainant:

Introduction

1. Complainant, EuroHealth B.V., is a private limited company incorporated under the laws of the Netherlands, having its statutory seat and registered place of business in Rotterdam, the Netherlands. Mr. Johannes A.G. de Groot, is statutory director of the Complainant, having sole and independent authority to represent the Complainant. Complainant has been established by Deed of Incorporation (“Akte van oprichting”) of 19 May 2000.

2. Complainant is engaged in the development and exploitation of internet related products and services, such as the development of e-commerce websites, online gaming websites, health care portals, meta search engine development (for airline ticket search), product comparison engines, ticket booking applications and online travel websites.

3. Eurohealth B.V. is the statutory company name of Complainant and is also used as a trade name of the Complainant. In addition to the name EuroHealth B.V., Complainant conducts its business under the name FlyCheap. The name FlyCheap is used by the Complainant as a trade name and business identifier in particular in relation to the following services offered by its company: a website built on a meta

search engine enabling internet users to find and book cheap airline tickets. The trade name/business identifier FlyCheap has been used by the Complainant since November 2005, when it started offering the abovementioned services through the website (URL) www.flycheap.tv.

4. Complainant has applied for the domain name flycheap.eu by application filed with Respondent, EURid, on 3 April 2006 (hereinafter: “the Application”), during the second phase of the phased registration period (Sunrise II), on the basis of its prior right to the trade name/business identifier FlyCheap, which is recognized and protected as such under the national laws of the Netherlands.

5. By decision issued on 20 October 2006 (hereinafter: “the Disputed Decision”), Respondent rejected the Application on the ground that Complainant, according to Respondent, did not submit sufficient proof of public prior use.

6. Complainant is of the opinion that its Application complied with all the applicable .eu Regulations and that the Disputed Decision conflicts with Commission Regulation (EC) No 874/2004 of 28 April 2004 (hereinafter: “Regulation 874/2004”), in particular Article 10 (1), Article 10 (2) and Article 12 (2) thereof, as well as with Section 16 (5) in connection with Annex 1 of the .eu Sunrise Rules.

Legal framework
Community law

7. Article 10 (1) of Regulation 874/2004 provides that holders of prior rights 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 names starts (i.e. Sunrise I and II), and that prior rights shall be understood to include, inter alia, trade names, business identifiers and company names.

8. Article 12 (2) of Regulation 874/2004 provides that during Sunrise I, only registered national and Community trademarks, geographical indications, and the names and acronyms referred to in Article 10 (3) (regarding public bodies) may be applied for as domain names, whereas during Sunrise II, the names that can be registered in Sunrise I as well as names based on all other prior rights can be applied for as domain names by holders of prior rights on those names.

9. Article 12 (3) of Regulation 874/2004 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, as well as other relevant information, such as registration information at chambers of commerce.

10. Recital 12 of Regulation 874/2004 sets out the purpose of the phased registration period as follows:

“In order to safeguard prior rights recognised by Community or national law, a procedure for phased registration should be put in place. Phased registration should take place in two phases, with the aim of ensuring that holders of prior rights have appropriate opportunities to register the names on which they hold prior rights. The Registry should ensure that validation of the rights is performed by appointed validation agents. On the basis of evidence provided by the applicants, validation agents should assess the right which is claimed for a particular name. Allocation of that name should then take place on a first-come, first-served basis if there are two or more applicants for a domain name, each having a prior right.”

11. Annex 1 to the .eu Sunrise Rules (hereinafter: “Sunrise Rules”) sets out which prior rights established by national law are recognised by each of the Member States, and which documentary evidence must be submitted to Respondent to apply for a domain name in the phased registration period on the basis on such prior rights. Annex 1 provides that the Netherlands recognize the protection of trade names, company names as well as business identifiers, and that, for each of these prior rights, the documentary evidence as referred to in Section 16 (5) Sunrise Rules is required. As an additional condition, Annex 1 provides that the use of the trade name, company name or business identifier in the course of trade must be demonstrated.

12. Section 16 (5) Sunrise Rules provides that, where it is obligatory and/or possible to register the relevant trade name or business identifier in an official register, it is sufficient to submit the following Documentary Evidence for trade names and business identifiers: a) an extract of such 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. As an example of such proof a public use, copies of advertising or promotional material may be submitted.

National law

13. In the Netherlands, it is obligatory that a private limited company (in Dutch: “besloten vennootschap”, abbreviated as “B.V.”) is

registered in the trade register of the Netherlands Chamber of Commerce (hereinafter: “the trade register”).

This follows from:
• Book 2, Article 180 (1) of the Netherlands Civil Code (“Burgerlijk Wetboek”), which provides that the directors of private limited companies are obliged to register the company in the trade register;
• Article 3 (1) of the Netherlands Trade Register Act 1996 (“Handelsregisterwet 1996”), which provides that companies based in the Netherlands are to be registered in the trade register; and
• Article 4 (1) of the Trade Register Act 1996, which provides that private limited companies having their statutory seat in the Netherlands are to be registered in the trade register.

Copies of the Dutch language texts of these statutory provisions as well as English translations thereof was attached to the Complaint.

14. Article 9 of the Trade Register Decree 1996 (“Handelsregisterbesluit 1996”) provides which information must be registered in the trade register for each company based in the Netherlands. This includes, in Article 9 (1) sub a), Uthe trade name or trade namesU of the company. The trade name of a company, therefore, must be registered in the trade register, whereby it is explicitly noted that a company may use and register more than one trade name. A copy of the language text of Article 9 of the Trade Register Decree, as well as the English translation thereof, was attached to the Complaint. It is explicitly noted here that the trade register does not provide the date on which a certain trade name was registered. This is beyond the control of the company/registrant who registered the trade name in the trade register.

15. According to Article 14 Trade Register Act 1996, the trade register is public. This means that each and everyone can obtain from the trade register an extract with company information of each company based in the Netherlands. Such an extract contains all kinds of relevant information relating to a company, including the statutory company and the trade name or trade names used by that company in the course of trade. The trade register is easily accessible through the internet or by contacting or visiting any of the Chambers of Commerce in the Netherlands.

16. On the basis of the Trade Name Act (“Handelsregisterwet”) trade names are recognised in the Netherlands as intellectual property rights. Article 1 of the Trade Name Act defines a trade name as “the name under which a business is conducted”. It is well accepted in practice and in legal theory, that a company may have more than one trade name, for example for the various divisions or parts of its business. The Trade Name Act applies to each of these trade names. Although the factual use of a trade name is the course of trade is required to be protected as a trade name under the Trade Name Act, intensive use of the trade name is not required. A legal commentary on Article 2 of the Trade Name Act was submittedT, together with the English translation thereof, which confirms the foregoing. The commentary indicates that:
“(…) If a business uses several names (possibly for departments/units), it uses more than one trade name; the law applies to each of these.”

And, regarding the intensity of the creating or infringing use of a trade name:

“b) Intensity. To the degree of the intensity of law creating or infringing use, low demands are usually imposed. As a rule, actual use known to third parties is sufficient. (…)”

Summary

17. According to the Sunrise Rules (Section 16 (5) (i) as well is Annex 1 of the Sunrise Rules), read in conjunction with national law relating to trade names, the following documentary evidence was required to apply for a domain name in Sunrise II based on a prior right to a trade name or business identifier as recognized and protected in the Netherlands:

a) an extract of the trade register;

b) proof of public use of the trade name, company name or business identifier prior to the date of Application; and

c) as an additional condition in Annex 1 to the Sunrise Rules: proof of the use of the trade name, company name or business identifier in the course of trade.

The documentary evidence referred to under b) and c) are much related. It may be accepted that evidence of public prior use of a trade name, company name or business identifier also demonstrates the proof of such name in the course of trade and the other way around. As proof of public prior use of a trade name, company name or business identifier, copies of advertising or promotional material are

accepted.

18. The trade name or trade names under which a company conducts its business are registered in the trade register, which register is publicly accessible to each and everyone with an interest to obtain such information. It is common and accepted in the Netherlands, that a company may use more than one trade name, for example for different divisions or parts of its company.

Evidence of the Complainants prior rights

19. Complainant has submitted to Respondent the following documentary evidence of its prior right to the trade name/business identifier FlyCheap and the public prior use thereof in accordance with Section 16(5) of the .eu Sunrise Rules (hereinafter: "the Sunrise Rules"):

a) An extract of the Commercial Register of the Netherlands Chamber of Commerce dated 2 May 2006, containing the company information of the Complainant as prescribed by law, including its trade names. A copy of this extract as well as a certified English translation thereof, was attached to the Complaint;

b) An example of company stationary with the FlyCheap logo, which explicitly states that FlyCheap is a trade name of the Complainant. A copy thereof was attached to the Complaint.

20. As illustrated above, Complainant uses the name FlyCheap as a trade name and business identifier for the following part of its business: a website built on a meta search engine enabling internet users to find and book cheap airline tickets. In other words: the products and services offered on this website are offered under the trade name and business identifier FlyCheap. Complainant uses other trade names and business identifiers for other parts of its business activities. For example (without any further relevance here), the Complainant uses the trade name and business identifier Dtravel for services in relation to comparison of shopping websites for the booking of airline tickets.

21. The extract of the trade register demonstrates that FlyCheap is registered as a trade name of the Complainant in the trade register. The extract itself already demonstrates the public prior use of the trade name FlyCheap: the trade register contains company information which is publicly available and accessibly to each and everyone with an interest to obtain information on the company of the Complainant. The registration of the trade name FlyCheap in the trade register, therefore, constitutes "actual use known to third parties". According to Netherlands trade name law, this should be sufficient to prove the use of a trade name (see par. 15 above).

22. The public prior use of the trade name/business identifier FlyCheap was further demonstrated by the Complainant by the company stationary with the FlyCheap logo, explicitly stating that FlyCheap is a trade name of the Complainant. Such company stationary falls in the category of advertising or promotional material which, according to Section 16 (5) (i) b Sunrise Rules is explicitly accepted as evidence of public prior use of a trade name or company name.

23. The evidence submitted with Respondent not only proves the public use of the FlyCheap in the sense of to Section 16 (5) (i) b Sunrise Rules, but also proves the public use of such name in the course of trade as required by the Netherlands according to Annex 1 to the Sunrise Rules.

24. This company stationary, as well as other promotional material with the FlyCheap trade name and logo, have been used by the Complainant in the course of trade prior to the date of the Application. As mentioned in par. 3 above, the trade name/business identifier FlyCheap has been used by the Complainant since November 2005, when it started offering the abovementioned services under this name on the websites (URL's) www.flycheap.tv and www.FlyCheap.150m.com. A print-out of the websites www.flycheap,.tv as it was used and available to the public since November 2005, was attached to the Complaint which also contains another example of the flycheap trade name logo which was then used by the Complainant on company stationary. (The websites www.flycheap.tv and www.FlyCheap.150m.com are now under construction and temporarily inactive.)

25. The active use of the trade name and business identifier FlyCheap by the Complainant is also illustrated by the Benelux trademark for the FlyCheap logo filed on 4 October 2006 and registered in the Benelux trade mark register on 30 October 2006. An extract of the Benelux trademark register of said trademark was attached to the Complaint.

Conclusion

26. The foregoing illustrates that, contrary to the decision of Respondent, the Complainant díd submit with its Application sufficient

proof of public prior use of the trade name and business identifier FlyCheap. By rejecting the Application on such ground, Respondent has deprived the Complainant of its rights under Article 10 (1) and Article 12 (2) of Regulation 874/2004. On the basis of these provisions, in conjunction with Section 16 (5) and Annex 1 to the Sunrise Rules, Complainant, as the first applicant to the domain name flycheap.eu during Sunrise II, was entitled to the domain name flycheap.eu. The disputed decision, therefore, is in conflict with Regulation 874/2004, in particular Articles 10(1), 10 (2) and 12 (2) thereof, as well as Section 16 (5) in connection with Annex 1 of the Sunrise Rules.

27. Now that the Application of the Complainant also complied with all of the other applicable .eu Regulations, Respondent should have accepted the Application and should have registered the domain name flycheap.eu in the name of the Complainant.

REMEDIES SOUGHT:

The Complainant therefore requests, in accordance with Article B(b)(1) of the ADR Rules, that the Complaint be submitted for a decision in an ADR Proceeding in accordance with the Procedural Rules as defined in Article A(1) of said ADR Rules.

Complainant seeks the following remedies:
A. that the Arbitration Panel decides that the decision of Eurid issued on 20 October 2006 rejecting the Application of the Complainant dated 3 April 2006 for the domain name flycheap.eu (hereinafter: "the Disputed Decision") conflicts with Commission Regulation (EC) No 874/2004 of 28 April 2004 (hereinafter: "Regulation 874/2004"), in particular Article 10 (1), Article 10 (2) and Article 12 (2) thereof, as well as with Section 16 (5) in connection with Annex 1 of the .eu Sunrise Rules;

B. that the Arbitration Panel decides that the Application of the Complainant dated 3 April 2006 for the domain name flycheap.eu complies with all the applicable regulations to be granted a domain name, in particular Article 10 (1), Article 10 (2), Article 12 (2), Article 12 (3) and Article 14 of Regulation 874/2004, as well as with Section 16 (5) in connection with Annex 1 of the .eu Sunrise Rules;

C. that the Disputed Decision be annulled; and

D. that the domain name flycheap.eu be attributed to the Complainant and, pursuant to Seciont 27 of the .eu Sunrise Rules, that Eurid be ordered to immediately register the domain name in the name of the Complainant and activate the domain name.

B. RESPONDENT

1. GROUNDS ON WHICH THE RESPONDENT REJECTED THE APPLICATION BY EUROHEALTH B.V. FOR THE DOMAIN NAME FLYCHEAP

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 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..(…)".

As far as trade name protection in the Netherlands is concerned, Annex 1 to the Sunrise Rules requires the applicant to submit "documentary evidence as referred to in Section 16(5) of the Sunrise Rules" and adds that "use of the trade name in the course of trade must be demonstrated".

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); (…)".

EUROHEALTH B.V. (hereafter "the Complainant") applied for the domain name FLYCHEAP on 3 April 2006.

The processing agent received the documentary evidence on 3 May 2006, which was before the 13 May 2006 deadline.

The Complainant submitted documentary evidence consisting of:
- a certificate of registration with the Chamber of Commerce in Rotterdam (The Netherlands) for the company "EUROHEALTH B.V.", showing as registered trade name, amongst more than 30 other trade names, the name “FLYCHEAP”;
- a page with a logo and the name FlyCheap.

Based on the documentary evidence submitted 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.

2. COMPLAINANT'S CONTENTIONS

The Complainant argues that it sufficiently demonstrated its prior right on a protected trade name because it submitted an extract from the official register as well as a proof of public use of the trade name.

In particular, the Complainant argues that the public use of the trade name in the course of trade was sufficiently demonstrated by the page with a logo and the name FlyCheap and also by the fact that the register for trade names in the Netherlands is publicly available.

The Complainant also attaches new documents to its complaint; in particular, a trade mark application (applied for on 4 October 2006).

The Complainant requests the Panel to annul the Respondent's decision and to grant the domain name FLYCHEAP to the Complainant.
3. RESPONSE

The Respondent first argues that the Regulation and the Sunrise Rules clearly and certainly provide that the burden of proof was with the Complainant to demonstrate that the claimed prior right is protected under the law of the Member State where protection is claimed.

Secondly, the Respondent argues that the Respondent and the validation may consider as documentary evidence only the documents that are received by the validation agent within 40 days from the submission of the application.

Finally, the Respondent argues that in order to demonstrate the protection of its trade name in the Netherlands, the Complainant should have provided evidence of use of the trade name in the course of trade.

3.1 The burden of proof was with the Complainant to demonstrate the protection of the claimed prior right

Article 10 (1) of the Regulation states that only holders of prior rights recognised or established by national and/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.

Pursuant to article 14 of the Regulation, the applicant must to submit documentary evidence showing that he or she is the holder of the prior right claimed on the name in question. Based on this documentary evidence, the validation agent shall examine whether the applicant has prior rights on the name.

It is therefore of crucial importance that the Respondent is provided with all the documentary evidence necessary for it to assess if the applicant is indeed the holder of a prior right.

The burden of proof was thus on the Complainant to substantiate that it is the holder of the claimed prior right (see for example decisions in ADR 127 (BPW), 219 (ISL), 294 (COLT), 551 (VIVENDI), 984 (ISABELLA), 843 (STARFISH), 1931 (DIEHL, DIEHLCONTROLS), 2350 (PUBLICARE), 2881 (MRLODGE), etc.).

As the panel clearly summed up in case ADR 1886 (GBG),

"According to the Procedure laid out in the Regulation the relevant question is thus 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.

If an applicant fails to submit all documents which show that it is the owner of a prior right the application must be rejected".

3.2 The Respondent’s decision must be evaluated only on the basis of the documentary evidence received within the deadline set forth by the Regulation

Pursuant to the Regulation article 14 of the Regulation, the Respondent may only accept, as documentary evidence, documents that are received by the validation agent within 40 days from the submission of the application for the domain name.

In the present case, the 40 days period ended on 13 May 2006, as established by the WHOIS database.

The documents received on 3 May 2006 by the validation consisted of:
- a certificate of registration with the Chamber of Commerce in Rotterdam (The Netherlands) for the company "EUROHEALTH B.V.", showing as registered trade name, amongst many other trade names, the name “FLYCHEAP”;
- a page with a logo and the name FlyCheap.

This set of documentary evidence is attached to the non standard communication dated 6 December 2006.

The Complainant attaches new documents to its complaint filed on 28 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 Regulation. Therefore, only considered the set of documents received on 3 May 2006 must be considered.

Furthermore, 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.

Therefore, only the documentary evidence which the Respondent was authorized to examine at the time of validation of the application should be considered by the Panel to assess the validity of the Respondent's decision (see notably cases ADR 294 (COLT), 954 (GMP), 1549 (EPAGES), 1674 (EBAGS), 2124 (EXPOSIUM), etc.).

The new documents attached to the present complaint were not received by the validation agent during the 40 days period, which means that the Respondent could not use this information for taking its decision. Therefore, this information may not be taken into consideration to evaluate whether the Respondent's decision conflicts with the Regulation, which is the only purpose of the present ADR proceedings.

This was clearly summarised by the Panel in ADR 2881 (MRLODGE): " the Panel has no authority to validate the Complainant’s application retrospectively based on additional documentary evidence which was submitted in the ADR proceedings but which was not submitted to the validation agent within the applicable time limits (see cases 219 (ISL), 294 (COLT), 706 (AUTOWELT), 954 (GMP), and 1627 (PLANETINTERNET)). Previous ADR decisions, with which this Panel concurs, concluded that the ADR procedure is not intended to correct domain name applicants’ mistakes (see cases 551 (VIVENDI), 810 (AHOLD), 1194 (INSURESUPERMARKET), and 1627 (PLANETINTERNET))."
3.3 The documentary evidence received by the validation agent was not sufficient to establish a company name protected in the Netherlands

As established by the WHOIS database, the Complainant claimed a prior right in the form of a trade name protected in the Netherlands.

Therefore, the Complainant bears the burden of submitting documentary evidence that shows that it is the holder of this claimed prior right, pursuant to article 14 of the Regulation. If the Complainant fails to provide adequate documentary evidence, its application must be rejected (see point 3.1. of this response).

The Complainant contends that the Complainant provided sufficient documentary evidence to establish the claimed prior right because it submitted a certificate of incorporation as indicated in section 16 (5) of the Sunrise Rules and a proof of public use.

Indeed, 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); (…)".

The Complainant correctly provided a certificate of registration with the Chamber of Commerce in Rotterdam (The Netherlands) for the company "EUROHEALTH B.V.", showing as registered trade name the name “FLYCHEAP”.

The certificate of registration shows that the Complainant registered not less than 38 trade names, amongst which many names appear to be generic words, particularly desirable as domain names (eg ranking, they, myfile, masterpiece, letter, official, filing, etc…).

However, in order to establish a protected trade name, the Complainant must also establish the public use of the trade name by the Complainant to identify itself in the course of trade.

Section 16 (5) of the Sunrise Rules provides a non exhaustive list of documents that the Complainant may provide to establish such public use 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).

The only documents included in the documentary evidence to that effect by the Complainant is a page with a logo and the name FlyCheap.

Such document does not establish that the trade name was publicly used prior to the date of the application. Neither does it establish that the use is public or that the use is in the course of trade.

Therefore, the validation agent correctly found that the Complainant did not meet its burden of proof pursuant to article 14 of the Regulation and the Respondent correctly rejected the Complainant's application.

The Respondent refers this Panel to two previous ADR decisions which are very similar to the present case because the applicant also claimed a prior right protected in the Netherlands without providing proof of public use in the course of trade prior to the date of the application.

In ADR 3593 (CENTRIC), the Panel decided that: “According to Annex 1 of the Sunrise Rules, Dutch company names are prior rights as provided in Article 16(5) Sunrise Rules, and consequently the mere registration of the company name does not establish a prior right within the meaning of Article 10(1) of the Regulation. Therefore applicants relying on registered Dutch company names must also show use of the company name. In this case the applicant relied on a Dutch company name registration, but did not provide any evidence of use of the name. It follows that the Respondent was correct in not considering the prior right claimed as a valid prior right and in rejecting the application on this ground.”

In ADR 3563 (ENOVATION), the Panel decided that: "Nevertheless, based on the above mentioned Annex 1 to the Sunrise Rules, which provides that concerning company names of certain countries – as company names of the Netherlands - the use of the company name in the course of trade prior to the date of Application must be demonstrated as well, as required by Section 16 (5) of the Sunrise Rules. Section 16 (5) b) contains a number of documents which are appropriate to evidence the use of the company name in the course of trade, such as, proof of sales volumes, copies of advertising or promotional materials, invoices on which the trade name or business identifier is mentioned. Neither the Applicant nor the Complainant submitted such documents or any other documents demonstrating the use of the company name in the course of trade prior to the date of Application within the meaning of Section 16 (5) of the Sunrise Rules. As a consequence of the above, according to the standpoint of the Panelist the Respondent acted correctly when it rejected the application, since the Applicant did not fulfill its obligation concerning the evidencing of the use of the invoked prior right in the course of trade".

For the sake of completeness, the Respondent notes that the Complainant's argument that it does not need to establish a public use of the trade name prior to the date of the application because the commercial register are publicly accessible could not stand both from a logical and a legal point of view. It is not because the register could be consulted by the public that the Complainant publicly used this name as its trade name in the course of trade.

Finally, regarding the trademark application that the Complainant attaches to its complaint, the Respondent notes that these documents were not part of the documentary evidence received within the deadline. This is not surprising since the trademark was applied for only on 4 October 2006, seven months after the Complainant's application for the domain name FLYCHEAP. Furthermore, this trademark was not applied for by the Complainant (but by Han de Groot).

3.4 Conclusion

The Regulation and the Sunrise Rules give all the holders of prior rights the opportunity to demonstrate their prior rights during the phased registration, which is an exception to the basic principle of first-come first-served.

In order to benefit from this opportunity to demonstrate its prior rights, the applicant must comply with the procedure laid out by the Regulation.

The Complainant in the present case did not correctly seize this opportunity, because it did not meet the burden of clearly establishing the protection of its claimed prior right.

For these reasons, the complaint should be denied.

DISCUSSION AND FINDINGS

This case is all about whether or not that Complainant in due time (40 days after having filed the application for the domain name flycheap.eu) to the Validation Agent according to the applicable Regulations and Sunrise Rules submitted sufficient documentary evidence of its prior right to the trade name FLYCHEAP.

Mainly for the reasons set out by the Respondent this Panel cannot rule in favour of the Complainant.

EC Regulation 874/2004 states in Article 10 that right holders of prior rights shall be eligible to apply to register domain names corresponding with such prior rights in a system of phased registrations – the Sunrise Periods.

Further in the said Regulation Article 14 states that such applicants much demonstrate the existence of the rights on which basis the domain name is sought registered. Such documentation must be submitted to a Validation Agent within 40 days from the submission of the application for the domain name.

As to what documentary evidence is needed with respect to the different kinds of prior rights the Sunrise Rules sets out a the terms hereof.

Section 16 (5) states the following:

5. DOCUMENTARY EVIDENCE FOR TRADE NAMES AND BUSINESS IDENTIFIERS
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);
(ii) where registration is not obligatory, the Documentary Evidence referred to in Section 12(3) hereof.

The Documentary Evidence for a trade name or a business identifier must clearly indicate that the name for which the Prior Right is claimed is the trade name or business identifier of the Applicant.

The Complainant submitted to the Validation Agent – in due time – documentation which consisted of an extract of the relevant official register. However this extract did not show the date on which the trade name was registered. The reason hereto was according to the Complainant that such data is not registered in the register and is of such out of the hands of the Complainant.

The Complainant however did not explain this to the validation agent nor did it send a copy of the application for the trade name or the like at least trying to proof that the trade name was established prior to the application for the domain name.

Also a part of the documentary evidence was a company stationary / writing paper showing the name of the applicant and the FLYCHEAP-logo.
The stationary was besides the name and logo a completely blank paper and showed as such no date nor any other information stating a proof of public use.

The Complainant argues that according to the relevant Dutch Laws use known to third parties is sufficient to create a trade name.

This Panel finds that a company stationary showing nothing but a blank document with the trade name (logo) and the name of the applicant does not at all meet even basic requirements for proving public use.

The mere fact that the trade name is available to the public in a company register does also not establish a proof of use.

For these reasons the Panel finds that the Complainant has not submitted proper documentary evidence showing the right to the trade name FLYCHEAP according to the Regulations and the Rules (especially Section 16 (5)).

Documentary evidence or the like presented to the Panel under this ADR proceedings that has not been submitted to the Validation Agent in due time has – in accordance with the applicable Regulations and Rules and CAC practice - not been taken into any account nor considerations.

The Panel must stress to the Respondent that the documentary evidence sent to the Validation Agent by the Complainant was in fact not submitted by the Respondent in the standard communication dated 6 December 2006. However, based upon the Parties contentions and submitted annexes the Panel finds that the Parties agrees on which documentary evidence was in fact submitted and that ths evidence was attached to the Complaint by the Complainant.

DECISION

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

the Complaint is Denied

PANELISTS

Name	**Mikkel Gudsøe**

DATE OF PANEL DECISION 2007-02-25

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

In the Sunrise 2 period the Complainant applied for the domain name flycheap.eu based upon its rights to the trade name FLYCHEAP.

The documentary evidence submitted by the Complainant to the Validation Agent consisted of an extract of the relevant company register, which – due to the nature of the Register – did not show the date on which the trade name was registered.

Also a part of the documentary evidence was a company stationary showing a blank paper with only the trade name (logo) and the name of the Complainant.

The Validation Agent / Respondent found that the documentary evidence did not proof public use of the trade name.

The Panel was not satisfied with the documentary evidence and found that the requirements set out in the applicable Regulations or the Sunrise Rules (Section 16 (5)) were not at all fulfilled.

Therefore the Complaint was denied.