# Panel Decision for dispute CAC-ADREU-003868

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| Case number | **CAC-ADREU-003868** |
| Time of filing | **2006-11-22 13:46:06** |
| Domain names | **omia.eu** |

## Case administrator

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| Name | **Tereza Bartošková** |

## Complainant

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| Organization / Name | **O.M.I.A., President Anne-Marie ENIXON** |

## Respondent

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| Organization / Name | **EURid** |

FACTUAL BACKGROUND

On March 7, 2006 an application was filed for the domain name “omia.eu” in the name of Annie ENIXON (hereinafter "the Applicant").

The validation agent received the documents evidencing the application on April 7, 2006, i.e. within the prescribed period.

On October 10, 2006 EURid (hereinafter the “Respondent” or the “Registry”) issued the decision based on which the application for the registration of the domain name “omia.eu” was rejected.

In this context, O.M.I.A. (hereinafter "the Complainant") submitted to the Czech Arbitration Court a complaint by email on November 21, 2006 and in hardcopy on November 30, 2006, requesting the annulment of the decision and attribution of the domain name “omia.eu” to the Complainant. The formal date of commencement of the ADR Proceeding (hereinafter the “ADR Proceeding”) is December 31, 2006.

A. COMPLAINANT

The Complainant in its statement summarized that EURID’s decision was based on alleged discrepancy between the identity of the Applicant and the identity of the owner of the Trademark rights and the name of the Applicant and the identity of the signatory of the application for registration.

According to the Complainant, on March 6, 2006, Mrs. ENIXON, the President of the Complainant, instructed Mrs. PERCEPT, the Marketing Assistant of the Complainant, to handle the file for registering the domain name "omia.eu" and certified the authenticity of the extract of the Register of Commerce concerning O.M.I.A.

By verbal instructions dated March 6, 2006, the Complainant requested ACTUNET, having its business seat in Centre d'Affaires du Pôle, ZI N°3, 16160 GOND-PONTOUVRE, France (hereinafter “ACTUNET”), in its capacity of a professional skilled in the art to apply for registration of the domain name "omia.eu" in the name of the Complainant with EURID, during the Phased Registration Period (hereinafter the “Sunrise Period”). This application was supposed to be grounded on the

“OMIA” trademark registration.

ACTUNET further instructed the Registrar GANDI SAS to apply for the registration of the said domain name. The application was filed by the Registrar GANDI SAS. According to the Complainant, the application was incorrect since it was filed in the name of the Applicant instead of the Complainant.

The Complainant further states that by e-mail dated April 3, 2006, Mrs. Harmonie LOUSTE, an employee of ACTUNET, sent an already filled in declaration to Mrs. Audrey PERCEPT, an employee of the Complainant. The application was to be signed and returned to her as soon as possible. In her above e-mail Mrs. LOUSTE also requested that Mrs. PERCEPT sent her a copy of an extract from the Register of Commerce of the Complainant and a copy of the "notification of the registered trademark”.

According to the Complainant, Mrs. PERCEPT was not skilled in domain names registrations process and thus relied upon ACTUNET's competence to fill out the relevant documents. Upon instructions of the Applicant, she signed the application form on April 4, 2006 and sent all documents including the copy of the Trademark renewal and the extract from the Register of Commerce to ACTUNET. ACTUNET further submitted the above mentioned documentary evidence to the validation agent.

In the opinion of the Complainant, the mistake in the registration process was caused by the negligence of ACTUNET and consists of three separate errors, as follows:

- instructing GANDI SAS to file the application in the name of the Applicant
- filling out the application declaration on behalf of O.M.I.A. incorrectly
- not verifying whether Mrs. PERCEPT was entitled to sign the application declaration or not.

The Complainant further argued that the errors contained in the application for the registration of the domain name "omia.eu" and in the application declaration do not result from its fault or its negligence in as much as it has specifically appointed a professional skilled in the art to handle the whole procedure.

Thus, the Complainant requested that EURID's decision be nullified or cancelled or dismissed and the domain name "omia.eu" be registered in the name of the Complainant.

B. RESPONDENT

The Respondent summarized the grounds under which the Complainant’s application for the registration of the domain name “omia.eu” was rejected. In this context it referred, in particular, to Articles 10 (1), 12 (3), 14 of Commission Regulation (EC) No. 874/2004 of 28 April 2004 (hereinafter the "Regulation") and section 3 (1) (i) of eu. Registration Policy and Terms and Conditions for Domain Name Applications made during the Phased Registration Period (hereinafter the “Sunrise Rules”).

The Respondent emphasized that the Applicant, i.e. ANNIE ENIXON, applied for the domain name “omia.eu” on 7 March 2007 and on 7 April 2007 the processing agent received the documentary evidence consisting of the abstract from the company register from the Commercial Court in Angouleme stating that the company O.M.I.A. was duly registered under French law; and the certificate of registration (with renewal) stating that the French trademark “OMIA” is registered in the name of O.M.I.A.

Therefore, the validation agent concluded that the Applicant did not demonstrate that it was the holder of a prior right and the Respondent rejected the application.

With regard to the Complainant’s contentions the Respondent stated that the name of the Applicant is ANNIE ENIXON. According to the Respondent, this fact results from the WHOIS database and from the application itself, which did not contain the company O.M.I.A. in the field “organization”, but only the name of the Applicant, i.e. ANNIE ENIXON, in the field “name”. Moreover, this fact was not even disputed by the Complainant itself.

Additionally, the Respondent cited Article 10 (1) of the Regulation, under which only the holders of prior rights recognized 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 domains starts.

The Respondent also referred to Article 14 of the Regulation, under which the applicant must 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. According to the Respondent, 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.

Furthermore, since the Applicant, i.e. ANNIE ENIXON, was not the holder of the trademark "OMIA" (which on the face of the documentary evidence belongs to O.M.I.A.), the Respondent correctly rejected the Applicant's application. Moreover this fact is not even disputed by the Complainant.

The Respondent further stated that the Respondent/the validation agent were under no obligation to investigate into the circumstances of the application. In the opinion of the Respondent, a direct consequence of the fact that the Regulation places the burden of proof on the applicant to clearly demonstrate that it is the holder of the prior right claimed is that the validation agent/Respondent may not be expected to ask for more documents if the applicant itself did not provide sufficient evidence. To support the above conclusion the Respondent further referred to sections 21 (2), 21 (3) of the Sunrise Rules, and to various ADR cases. Additionally, the Respondent argued that the said fact was not even disputed by the Complainant.

The Respondent further stressed that the mistakes made by the Applicant and/or the Complainant and/or their agents during the registration process may not be attributed to the Respondent. Thus, what has actually happened between the Complainant, its contractors and even its registrar is not relevant for the ADR Proceeding and the Respondent may not be held responsible for the negligence or mistakes made by the Applicant and/or the Complainant and/or their agents or even their registrars.

To support the said conclusion the Respondent cited section 5 (3) of the Sunrise Rules, under which the Registry, Validation Agents and the Government Validation Points are not a party to the agreement between the Applicant and his Registrar or to the agreement between the Applicant and his Document Handling Agent and therefore cannot incur any obligation or liability under these agreements.

Respondent also referred, to Article 22 (1) b of the Regulation, under which a decision taken by the Respondent may be annulled by the Panel only when it conflicts with the Regulation. The Respondent further summarized that it is clear that a mistake made by the Applicant's registrar and a fortiori by a contractor acting for the Applicant is the responsibility of the Applicant itself and is not a reason for overturning a decision regarding the application for the registration of the domain name.

Based on the aforementioned, according to the Respondent, the Complainant's complaint shall be denied.

## DISCUSSION AND FINDINGS

According to Article 10 (1) of the Regulation, only the holders of prior rights recognized 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.

According to Article 14, the applicant must 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. The applicant shall submit such evidence within forty days from the submission of the application for the domain name, otherwise the application for the domain name shall be rejected.

According to section 21 (2) of the Sunrise Rules, 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.

According to section 21 (3) of the Sunrise Rules, 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.

It is undisputable between the Complainant and the Respondent and it results from the documentation submitted, that the application for the domain name “omia.eu” was filed under the name of the Applicant, i.e. ANNIE ENIXON, on March 7, 2006.

In this context it is necessary to state that the validation agent received within the prescribed period the documentary evidence consisting of the abstract from the company register from the Commercial Court in Angouleme stating that the company O.M.I.A. is duly registered under French law; and the certificate of registration (with renewal) stating that the French trademark “OMIA” is registered in the name of O.M.I.A.

With regard to the above cited provisions and facts, there is no doubt that the only documentary evidence to be taken into account by the Panel should be the documentary evidence provided from the part of the Complainant within the prescribed period. Thus, the Panel did not consider as relevant the documentary evidence that was provided by the Complainant for the first time in the ADR Proceeding. From the above cited provisions it is also clear that the question is not whether the Complainant is the holder of the prior right in question but whether the Applicant submitted within the prescribed period documentary evidence showing that he or she is the holder of the prior right claimed on the name in question.

Thus, the Panel carefully examined the application submitted together with the abstract from the company register from the Commercial Court in Angouleme stating that the Company O.M.I.A. is duly registered under French law and the certificate of registration (with renewal) stating that the French trademark “OMIA” is registered to O.M.I.A.

As it results from the contents of the application itself, it is clear, that the application for the domain name registration was filed in the name of the Applicant, i.e. ANNIE ENIXON, however, all the documentary evidence submitted merely confirms the existence of the Complainant as a business entity and of its trademark registration. Furthermore, the said fact is also reflected by both parties in their statements made in the course of the ADR Proceeding, in which both parties expressly confirmed that the application was incorrect since it was filed in the name of ANNIE ENIXON, i.e. the Applicant, instead of O.M.I.A., i.e. the Complainant. Thus the allegation of the Complainant that the defects of the application did not result from the fault of the Complainant or its negligence in as much as it has specifically appointed a professional skilled in the art to handle the whole procedure must be considered as being irrelevant for the purposes of the ADR Proceeding.

Taking into account the above facts, in the opinion of the Panel it is thus clear that the Applicant did not provide the validation agent within the prescribed period with prima facie documentary evidence confirming the existence of the prior right claimed in favor of the Applicant and/or the relationship between the Applicant and the Complainant and/or the fact that the Applicant and the Complainant are the same entity. Moreover, the Panel is of the opinion that the Respondent may not be held responsible for negligence or mistakes made by the Applicant, and/or the Complainant, and/or their agents or even their registrars during the registration process. Therefore, for the purposes of the ADR Proceeding, the Panel finds it, immaterial, whether the defects made during the registration procedure were caused by the negligence of the Complainant or ACTUNET acting as the appointed agent on behalf of the Complainant.

The Registry therefore correctly rejected the registration of the domain name “omia.eu”.

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 | **Aleš Chamrád** |
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DATE OF PANEL DECISION 2007-02-16

## Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant contested the decision of the Registry to reject the application for registration of the domain name “omia.eu” on the ground that the defects of the application (consisting in the fact that the application was filed in the name of a different entity) did not result from the fault of the Complainant or its negligence in as much as it has specifically appointed a professional skilled in the art to handle the whole procedure, whose mistakes have caused the application to be defective.

According to Article 14, the applicant must 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.

According to section 21 (2) of the Sunrise Rules, 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.

According to section 21 (3) of the Sunrise Rules, 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.

Neither the fact that the application was defective, nor the nature of the defect was disputed by the parties. The application filed in the name of the Applicant clearly contained the required documentary evidence but not with respect to the Applicant, but with respect to a different entity, namely the Complainant.

When examining the application, the validation agent proceeded fully in accordance with the aforementioned principles, thus, the application was rightfully rejected by the Registry.