Panel Decision for dispute CAC-ADREU-004099

Case number	CAC-ADREU-004099
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Domain names	vivartia.eu

Case administrator

Name	Josef Herian

Complainant

Organization / Name	VIVARTIA-INDUSTRIAL & COMMERCIAL COMPANY OF FOOD PRODUCTS & CATERING SERVICES, VIVARTIA-INDUSTRIAL & COMMERCIAL COMPANY OF FOOD PRODUCTS & CATERING SERVICES VIVARTIA-INDUSTRIAL & COMMERCIAL COMPANY OF FOOD PRODUCTS & CATERING SERVICES

Respondent

Organization / Name	ANASTASIOS KARKAZIS

INSERT INFORMATION ABOUT OTHER LEGAL PROCEEDINGS THE PANEL IS AWARE OF WHICH ARE PENDING OR DECIDED AND WHICH RELATE TO THE DISPUTED DOMAIN NAME

Czech Arbitration Court Case No. 02675 related to Complainant's request to change the language of the ADR Proceeding pursuant to Article A3 of the ADR Rules from English to Greek. The Complainant invoked exceptional circumstances on the basis of economy of proceedings, as both parties are Greek and all documents of the ADR case were written in Greek. The Respondent wished to retain the English language, which is the language of the registration agreement. The Panel found that the Complainant failed to substantiate the presence of exceptional circumstances.

FACTUAL BACKGROUND

The Complainant in this ADR Proceeding is VIVARTIA-INDUSTRIAL & COMMERCIAL COMPANY OF FOOD PRODUCTS & CATERING SERVICES, a Société Anonyme (S.A.), broadly equivalent to a Public limited company (Plc) in English, incorporated under Greek Law, pursuant to the merger of DELTA HOLDING S.A., GOODY'S S.A.-RESTAURANT AND CATERING SERVICES ORGANIZATION, GENERAL FROZEN FOODS S.A., DELTA DAIRY S.A. and INDUSTRIAL AND COMMERCIAL S.A. OF STANDARDISED FOODS, through absorption of the second, third, fourth and fifth company by the first company, in accordance with the decision of the Shareholders' General Assembly of the first absorbing company dated June 1, 2006, and the decisions of the Shareholders' General Assembly of the second, third, fourth and fifth absorbed companies, dated June 2, 2006, June 2, 2006, June 2, 2006 and June 1, 2006 respectively, Art. 69-77 and 78 of Law 2190/1920, Art. 1-5 of Law 2166/1993 and the Public Notary Act 48245/4-8-2006 of Maria Poulantza-Agrevi, Public Notary of Athens. The Complainant is registered at the S.A. Register of the Greek Ministry of Development pursuant to decision K2-12403/31-8-2006.

The Respondent in this ADR Proceeding is Anastasios Karkazis.

The Complainant launched a Complaint with the Czech Arbitration Court on December 22, 2006 against the Respondent in respect of the domain name <vivartia.eu>. The Czech Arbitration Court, after assigning as Time of Filing the date of December 22, 2006, requested EURid verification for the disputed domain name on December 22, 2006 and on December 28, 2006 EURid replied in a non-standard communication, confirming that the disputed domain name was registered with .GR IpDomain, that the current Registrant of the domain name is the Respondent, providing the full contact details that are available in the WHOIS database for the domain name Registrant and the technical contact, confirming that the domain name will remain locked during the pending ADR Proceeding and indicating that the specific language of the registration agreement as used by the Registrant for the domain name is English.

On January 11, 2007 the Czech Arbitration Court notified the commencement of the ADR Proceeding, informing the Respondent that the Response was to be submitted within 30 working days from the delivery of the notification. The Respondent submitted his Response on February 9, 2007.

Following an invitation to serve as a Panelist in this dispute, the Panelist accepted the mandate and submitted the Declaration of Impartiality and Independence. The Czech Arbitration Court duly notified the Parties of the identity of the Panelist appointed on February 21, 2007, in accordance with Paragraph B4(e) of the ADR Rules and the date, by which a Decision on the matter was due, which was specified as March 12, 2007.

In the absence of a challenge of the Panel's appointment by either Party according to Paragraph B5(c) of the ADR Rules, the Czech Arbitration Court forwarded the case file to the Panel on February 26, 2007.

A. COMPLAINANT

The Complainant in the Complaint contends that the company VIVARTIA Industrial and Commercial Company of Food Products and Catering Services Société Anonyme (hereafter "VIVARTIA I.C.C.F.P.C.S. S.A.") with the distinctive title "VIVARTIA S.A." was formed as a result of the merger of DELTA HOLDING S.A., GOODY'S S.A.-RESTAURANT AND CATERING SERVICES ORGANIZATION, GENERAL FROZEN FOODS S.A., DELTA DAIRY S.A. and INDUSTRIAL AND COMMERCIAL S.A. OF STANDARDISED FOODS. The Complainant contends that VIVARTIA I.C.C.F.P.C.S. S.A. holds in the Greek market the 1st position in the food sector, the leading position in fresh milk, the 2nd position in plain milk, the leading position in the fast food sector, the 2nd position in juices, the dominant position in frozen products (Complaint, Exhibit 11) and is overall the 35th largest European food processor. The Complainant contends that it is active in a market of one billion people with total presence in 29 countries, having productive activity in 9 countries, commercial (only) activity in 6 countries and exporting activity in 14 countries.

The Complainant contends that the decision concerning the merger was announced by the Complainant on December 19, 2005, accompanied by the decision to change the company identity in the future and the beginning of the use of the provisional-transient name "BrandCo" to signify the creation of a house of leading food brands (Complaint, Exhibit 7).

The Complainant also contends that the Complainant proceeded to the filing of Greek trademark application 183987 on March 9, 2006 for the word mark "VIVARTIA" at the competent authority of the Greek Ministry of Development (Complaint, Exhibit 5), which has been accepted for registration by the competent Administrative Marks Tribunal, and the filing of Community trademark application 004969978 on March 10, 2006 for the same word mark (Complaint, Exhibit 6). The Complainant contends that according to Greek jurisprudence, a trademark application enjoys protection under the doctrine of expectation of rights.

The Complainant contends that the Athens Chamber of Commerce and Industry granted preliminary approval of the trade name "VIVARTIA I.C.C.F.P.C.S. S.A." and the distinctive title "VIVARTIA S.A." on March 9, 2006 by virtue of Protocol No. 5726 and decision -851378 (Complaint, Exhibit 3). The Complainant contends that the new name was announced to its staff on May 8, 2006 during an internal event and to the public on May 9, 2006 through newspapers available as early as 5 a.m. (Complaint, Exhibit 9) and at an event scheduled the same day, which received wide publicity (Complaint, Exhibit 10). The Complainant contends that the use of the name "VIVARTIA" also began on May 9, 2006 in corporate communication and in the following months the Complainant proceeded to the filing of trademark applications for the mark "VIVARTIA" in numerous countries of Europe and the rest of the world.

The Complainant contends that the registration of the disputed domain name <vivartia.eu> is speculative and abusive and must be revoked according to Article 21 of Regulation 874/2004, because:
1. the Complainant contends that the disputed domain name is identical or similar to Complainant's applied Greek word mark "VIVARTIA", applied Community word mark "VIVARTIA" and all other applied trademarks in numerous countries subsequently OR it is identical or similar to Complainant's trade name "VIVARTIA I.C.C.F.P.C.S. S.A." and the distinctive title "VIVARTIA S.A." to a degree that causes likelihood of confusion, as the terms "I.C.C.F.P.C.S. S.A." and "S.A." are descriptive and obligatory by Greek Law and rights to the trade name and the distinctive title were granted to the Complainant by virtue of their preliminary approval by the Athens Chamber of Commerce and Industry on March 9, 2006, their registration with the same Chamber on September 19, 2006 and their widespread use since May 9, 2006 and
2. the Complainant contends that the disputed domain name has been registered by the Respondent without rights or legitimate interest in the name, as laid out in Article 21(2) of Regulation 874/2004 and
3. the Complainant contends that the disputed domain name was registered in bad faith in the sense of Article 21(3)(a) or, in the alternative, Article 21(3)(b) and/or Article 21(3)(d) of Regulation 874/2004.

Finally, the Complainant contends, in a non-standard communication of January 9, 2007, that, as a Société Anonyme with registered seat in Athens-Greece (Complaint, Exhibit 1 and 2), the Complainant satisfies the general eligibility criteria for registration set out in Article 4(2)(b) of Regulation (EC) No 733/2002, and the Complainant, as a result, seeks the remedy specified in Paragraph B11(b) of the ADR Rules, i.e. the transfer of the domain name to the Complainant.

B. RESPONDENT

The Respondent in the Response contends that the change of the Complainant's trade name took place after the registration of the disputed domain name <vivartia.eu>. The Respondent contends that the trade name "VIVARTIA I.C.C.F.P.C.S. S.A." and the distinctive title "VIVARTIA S.A." were only approved by the Shareholders' Annual General Assembly (AGA) on June 1, 2006 (Complaint, Annex 1), registered as part of the modified articles of association with the S.A. Register of the Greek Ministry of Development pursuant to decision K2-12403/31-8-2006 (Complaint, Annex 1), at which point, according to Respondent's contentions, Complainant's rights under the trade name and distinctive title were created. In other words, the Respondent contends that at the time of the registration of the disputed domain name <vivartia.eu> no rights flowing from the trade name "VIVARTIA I.C.C.F.P.C.S. S.A." or the distinctive title "VIVARTIA S.A." existed. The Respondent contends that Complainant's trade name and distinctive title are only similar, but not identical to the disputed domain name <vivartia.eu>.

The Respondent also contends that at the time of the registration of the disputed domain name <vivartia.eu>, the Complainant had not been furnished with trademark rights in the mark "VIVARTIA". The Respondent contends that the Complainant has failed to submit evidence that the Greek word mark "VIVARTIA", applied for on March 9, 2006 (Application No. 183987), or the Community word mark "VIVARTIA", applied for on March 10, 2006 (Application No. 004969978), had been registered by May 9, 2006.

The Respondent contends that the Complainant applied for the Community trademark "vivartia" on July 12, 2006 (Application No. 005193164), two months after the registration of the domain name <vivartia.eu>.

The Respondent contends that the applied trademarks are composed of generic words, either the Latin word "viva" meaning "long live" or "saluting" and the Greek word "artia" meaning "perfection" or "completeness". The Respondent also contends that the Complainant has conceded that the trademark "VIVARTIA" is composed of five generic words, i.e. "vi" (victory), "viva" (an expression of life, vitality, quality of life, enthusiasm, well-being), "art" (not simply art, but also the technique, knowledge and experience at the heart of creativity), "artia" (Greek for harmony, balance and completeness) and "ia" (ancient Greek word for flower) (Complaint, Exhibit 8 and Response, Exhibit D).

The Respondent contends that the Respondent was not aware of Complainant's trademark applications or Complainant's change of trade name and distinctive title at the time of registration of the disputed domain name, as the Respondent contends that the Respondent processed the domain name registration in the morning of May 9, 2005 without having read newspapers as to the name change.

The Respondent concedes to having registered and still registering "domain names (mainly generic names), following the advice and the recommendations received by name generating companies and various registrars. Therefore, it is not ruled out that the specific domain name was recommended to me at the time by one of these companies."

The Respondent contends that the Respondent checked the owner status of the domain names <vivartia.gr> and <vivartia.com> on the day of registration of <vivartia.eu> in order to avoid future disputes with existing legal owners and the Respondent contends that they belonged to two different individuals and not the Complainant.

The Respondent concedes to contacting the Complainant's representative in this ADR Proceeding and the Respondent concedes that "[a] proposal was made to the representative to sell this domain name at a "symbolic" price in order to make the transfer official and to avoid any future legal actions by the complainant and/or other claiming parties." The Respondent contends that the Complainant's representative did not accept the proposal and the Respondent contends that the Respondent is involved in an ""ego proving situation" of a big corporation" under this ADR Proceeding. The Respondent concedes that he was not aware that he was violating the rights of the Complainant and his intent was to "transfer immediately the domain name to its lawful legal owner, which could well had proven to be a party other than the complainant."

The Respondent contends that the domain name was not registered in bad faith, because it comprises of generic words, the Respondent did not intend to prevent its registration by the Complainant, because the Respondent was not aware at the time about the company name change and the Respondent has not attempted to gain commercially at the expense of the Complainant, as the trade name was not well established with many years of existence and public awareness, i.e. no brand awareness.

Therefore, the Respondent seeks to retain ownership of the dispute domain name <vivartia.eu>.

DISCUSSION AND FINDINGS

ISSUES

1. Panel's general powers and mandate

Paragraph B7 sets out the general powers of the Panel. The provision reads:
"(a) The Panel shall conduct the ADR Proceeding in such manner as it considers appropriate in accordance with the Procedural Rules. The Panel is not obliged, but is permitted in its sole discretion, to conduct its own investigations on the circumstances of the case.
(b) In all cases, the Panel shall ensure that the Parties are treated fairly and with equality.
(c) The Panel shall ensure that the ADR Proceeding takes place with due expedition.
(d) The Panel shall determine in its sole discretion the admissibility, relevance, materiality and weight of the evidence."

According to Paragraph B11(a) of the ADR Rules, a Panel shall decide a Complaint on the basis of the statements and documents submitted and in accordance with the Procedural Rules.

According to Paragraph B11(d) (1) of the ADR Rules:
"The Panel shall issue a decision granting the remedies requested under the Procedural Rules in the event that the Complainant proves (1) in ADR Proceedings where the Respondent is the holder of a .eu domain name registration in respect of which the Complaint was initiated that
(i) The domain name is identical or confusingly similar to a name in respect of which a right is recognized or established by the national law of a Member State and/or Community law and; either
(ii) The domain name has been registered by the Respondent without rights or legitimate interest in the name; or
(iii) The domain name has been registered or is being used in bad faith."

By virtue of the aforementioned provisions, the Panel's mandate is to decide the Complaint on the basis of submitted statements and documents in accordance with the Procedural Rules. The Panel may, but is not obliged to, conduct its own investigations on the circumstances of the case. In the event that such investigations are conducted, they cannot prejudice the fair treatment and equality of the Parties, nor can they be so extensive as to call in question the Panel's impartiality and independence in the eyes of the Parties or lead to excess of mandate.

2. The relevant provisions

This Complaint arises in relation to the application and interpretation of primarily Regulation 874/2004 and is governed by the ADR Rules and the ADR Supplemental Rules.

Article 21 of Regulation 874/2004 provides the circumstances, under which a registered domain name shall be subject to revocation, sets out circumstances constituting legitimate interest and puts forward circumstances of bad faith registration or use of the domain name. Article 22 relates to the ADR Proceeding and Paragraph B1(b)(10) of the ADR Rules specifies:
"The Complaint shall be submitted in hard copy and in electronic form and shall:
[…] Describe, in accordance with these ADR Rules, the grounds on which the Complaint is made including, in particular,
(i) In case of an ADR Proceeding against the Domain Name Holder in respect of which domain name the Complaint is initiated:
A. why the domain name is identical or confusingly similar to the name or names in respect of which a right or rights are recognized or established by national and/or Community law (as specified and described in accordance with Paragraph B1(b)(9)); and, either
B. why the domain name has been registered by its holder without rights or legitimate interests in respect of the domain name that is the subject of the Complaint; or
C. why the domain name should be considered as having been registered or being used in bad faith.
[…]"

Therefore, in light of the aforementioned provisions, it is imperative to examine, whether the Complainant has proved, firstly, that the disputed domain name is identical or confusingly similar to a name in respect of which a right is recognized or established by national and/or Community law and, secondly, that the domain name has been registered by the Respondent without rights or legitimate interest in the name or the domain name has been registered or is being used in bad faith.

It is only if these requirements are satisfied as set out by the relevant provisions that the Complainant may be granted the remedy requested, i.e. the transfer of the disputed domain name.

3. Domain name identical or confusingly similar to recognized or established right

The Complainant invokes rights arising out of Complainant's trade name and distinctive title, on the one hand, and the applied "VIVARTIA" word marks, on the other hand. The Complainant needs to establish that the relevant right is either recognized or established

by national and/or Community law.

3.1 Trade name and/or distinctive title rights under Greek Law

In terms of Complainant's trade name and distinctive title under Greek Law, it is imperative to ascertain the time, when these were created, in relation to the registration of the disputed domain name <vivartia.eu> on May 9, 2006.

According to Greek Law, right in a trade name is created with its use in the course of trade in Greece, without the need for any formalities (Liakopoulos, A., Industrial Property II, Sakkoulas, Athens 1995, 4th ed., p. 187). In other words, registration of the trade name in the Registry of the respective Chamber of Commerce and Industry under Articles 4-8 of Law 1089/1980 does not confer trade name rights to their Registrant (Liakopoulos, ibid, p. 187). Such registration is of merely declaratory nature (Liakopoulos, ibid, p. 187). Use in the course of trade in Greece effectively means essential and continuous involvement of its rightholder in trade in Greece (Liakopoulos, ibid, p. 188).

Even in the case of inclusion of the trade name in the articles of association of a legal person, the right to seek protection of the trade name under Article 58 of the Greek Civil Code or Article 13 of Law 146/1914 is dependent on the use of the trade name in the course of trade (Liakopoulos, ibid, p. 188-189). In other words, use in the course of trade is a precondition for the creation of the trade name rights and, thereby, the protection of the trade name itself.

As far as the right to the distinctive title is concerned, the right is also created without the need for formalities with its use in the course of trade in Greece, if it has distinctive character, otherwise, if it lacks distinctive character, with its establishment in the course of trade (Liakopoulos, ibid, p. 193) and is protected under the conditions of Article 13 of Law 146/1914.

Greek jurisprudence is reluctant to recognize protection on the basis of expectation of rights in respect of trade name and/or distinctive title rights, which are rights created subject to use or, in appropriate cases, establishment in the course of trade (Foundedakis, T., The conflict of distinctive elements, Vol. 23, Series: Contemporary Issues of Commercial Law, Sakkoulas, Athens-Thessaloniki 2003, p. 59-63).

Under the particular circumstances of this case, Respondent's contentions as to the creation of trade name and/or distinctive title rights subject to their approval by the Shareholders' Annual General Assembly (AGA) on June 1, 2006, inclusion in the modified articles of association, registration as part of the modified articles of association with the S.A. Register of the Greek Ministry of Development pursuant to decision K2-12403/31-8-2006 or registration of the company with the Athens Chamber of Commerce and Industry are all irrelevant points for the creation of trade name and/or distinctive title rights.

On the other hand, the Complainant has failed to submit conclusive evidence as to when the use of the trade name and/or distinctive title began in the course of trade. The Complainant limited itself to ascertaining that the new trade name and distinctive title were announced during an internal event on May 8, 2006 and presented to the public on May 9, 2006, at which date the registration of the disputed domain name occurred, without further proof of use in the course of trade prior to or after these events. In light of these findings, the Complainant has failed to convince the Panel that trade name and/or distinctive title rights were created under Greek Law prior to the registration of the disputed domain name.

In terms of Complainant's invoked trademark rights under Greek and/or Community Law, it is equally imperative to ascertain the time, when these were created, in relation to the registration of the disputed domain name <vivartia.eu> on May 9, 2006.

The Complainant invokes trademark rights in the word mark "VIVARTIA" under Greek trademark application 183987, on the one hand, and Community trademark application 004969978, on the other hand. These will be dealt with separately below.

It suffices for the purposes of Article 21(1) Regulation 874/2004 to invoke a right either recognized or established by national and/or Community law, such as the rights mentioned in Article 10(1) of the same Regulation. The reference to Article 10(1) is illustrative, in other words other rights are also sufficient for the operation of Article 21(1) of Regulation 874/2004.

3.2 Greek trademark application

The Greek trademark application 183987 for the word mark "VIVARTIA" was filed on March 9, 2006, two months before the registration of the disputed domain name. The issue is whether a trademark application can be regarded as sufficient for the purposes of a right either recognized or established by Greek Law, as until this date (March 12, 2007) the word mark "VIVARTIA" has not been registered at the Trademark Registry of the competent authority of the Greek Ministry of Development.

According to Article 2 of Law 2239/1994 (Greek Trademark Law), the right to exclusive use of a trademark is conferred solely by virtue of its registration. Article 8(1) states that the Administrative Marks Tribunal decides on the grant of the trademark application. Article 15 provides that a granted trademark is deemed to be registered as of the date of filing of the application, while Articles 21(1) and 21(2) provide that trademark protection is granted for ten years from the next day of the date of filing, subject to renewal. In other words, when granted, the trademark enjoys retrospective protection from the next day of the date of filing. The Administrative Marks Tribunal ex officio examines a filed trademark application in light of both absolute and relative grounds for refusal of registration (Liakopoulos, ibid, p. 134-135). If the trademark application is accepted, a summary of the decision of the Administrative Marks Tribunal is published at the IP Bulletin of the Government Gazette. When the decision of the Administrative Marks Tribunal becomes irrevocable (not subject to appeal at the Supreme Administrative Court in Greece), the trademark is granted and registered at the appropriate Registry of the competent authority of the Greek Ministry of Development.

Under the particular circumstances of this case, the work mark "VIVARTIA" was applied for on March 9, 2006 and was subsequently examined by the Administrative Marks Tribunal for absolute and relative grounds for refusal of registration. Pursuant to decision 9014/2006, the Greek Administrative Marks Tribunal accepted the trademark application and publication in the IP Bulletin of the Government Gazette is at the moment pending. The disputed domain name was registered two months after the application was filed.

Had the ADR Proceeding been launched when the Greek word mark "VIVARTIA" had been granted with an irrevocable decision of the Administrative Marks Tribunal, such grant would refer back to the date of filing of the trademark application, establishing trademark rights with retrospective effect. In this case, however, the trademark application has not yet matured into a granted and registered trademark and the situation is different.

Greek jurisprudence accepts that a filed trademark application enjoys the protection of expectation of rights (Liakopoulos, ibid, p. 156 and Foundedakis, ibid, p. 63). An Applicant for a Greek trademark has rights in the trademark from the date of filing of the trademark application, which are conditional on a future event with retrospective effect. Under the doctrine of expectation of rights, the conditions for the creation of a right are satisfied in a way that it is safe to assume that upon completion of the procedure the right will be created. On this point, an expectation of rights is distinguished from mere hope of acquiring the right (Foundedakis, ibid, p. 58) and it is to be considered as a preliminary stage in the creation of the right, thereby enjoying the same legal nature and the same protection as the full acquired right (Foundedakis, ibid, p. 61). Indeed, Article 4(2)(b) of Law 2339/1994 provides that trademark applications subject to their grant are also considered as prior trademark rights for the purposes of examining relative grounds for refusal of registration of a sign.

In this particular case, the expectation of rights has matured to the degree that the Administrative Marks Tribunal has examined ex officio absolute and relative grounds for refusal of registration of the word mark "VIVARTIA" and has accepted the trademark application, which is now subject to publication. In other words, the trademark application has matured to the degree that the final grant and registration of the trademark can be reasonably expected for at least one of the classes.

The Panel accepts that Complainant's Greek trademark application of March 9, 2006 for the word mark "VIVARTIA" constitutes a recognized right under the doctrine of expectation of rights in Greece, irrespective of the fact that the trademark was not registered before the registration of the disputed domain name by the Respondent.

For the sake of completeness, the Panel will proceed to the examination of Complainant's Community trademark application 004969978. The Respondent in the Response also refers to Complainant's Community trademark application 005193164 filed on July 12, 2006. This trademark application is not relevant and will not be examined, as the Complainant never invoked protection under this trademark application for the figurative trademark "vivartia".

3.3 Community trademark application

The Complainant invokes trademark rights under Community trademark application 004969978 for the word mark "VIVARTIA", filed on March 10, 2006. At the time of issue of this decision, the Community trademark application has been examined in light of absolute grounds for refusal of registration, accepted and published. Opposition is pending. However, the Respondent is not one of the parties, which have launched opposition proceedings.

In light of the fact that under the Community trademark legal framework, the Office for Harmonization in the Internal Market checks absolute grounds for refusal of registration and relies on third parties for opposition proceedings on the basis of relative grounds for refusal of registration, it would seem that the mere publication of the application cannot be relied upon by the Complainant to establish a recognized or established right under Community law. Community trademark rights are obtainable by registration (Article 6 Regulation 40/94) and they are registered for a period of ten years from the date of filing of the application (Article 46). Certain rights indeed exist

under Article 9(3) of the same Regulation. The Article reads: “The rights conferred by a Community trade mark shall prevail against third parties from the date of publication of registration of the trade mark. Reasonable compensation may, however, be claimed in respect of matters arising after the date of publication of a Community trade mark application, which matters would, after publication of the registration of the trade mark, be prohibited by virtue of that publication. The court seized of the case may not decide upon the merits of the case until the registration has been published.”

The rationale of this provision indicates that even if certain rights can be claimed after the date of publication of the application, these may not be decided upon until the registration has been published. Under the circumstances of this case, it is premature at this point to allow the Complainant to rely on the Community trademark application as a recognized or established right of Community law.

However, as the Panel is satisfied that the Complainant ascertained a right recognized by Greek Law, the analysis will proceed to further elements.

3.4 Alleged generic nature of applied trademarks

The Respondent alleged, inter alia, that the word mark “VIVARTIA” applied for in Greece is generic, as composed of two generic words. The Complainant has offered a much more elaborate explanation of the terms combined in the applied word mark (Complaint, Exhibit 8). The Panel notes that this issue has already been decided by the Administrative Marks Tribunal through the ex officio examination of absolute grounds for refusal of registration. The word mark was not found to be generic. Incidentally, the word mark “VIVARTIA” has also been submitted to examination on the basis of absolute grounds under the Community trademark application of March 10, 2006 and the application has been accepted without any problems. Furthermore, even if it were assumed that the words combined in the word mark were generic, the fact that these are combined into one word gives that combination distinctive capacity.

3.5 Identical or confusingly similar

When assessing whether the domain name is identical or confusingly similar to Complainant’s recognized right, it is established practice to disregard the top-level part of the domain name, as its existence is dictated by the very nature of the DNS and the inclusion of a gTLD or a ccTLD merely fulfils the function of distinguishing one namespace from others. The same applies to writing in capital or small letters. It is of no significance that the applied Greek word mark is written in capital letters, whereas the domain name in small letters, as the latter is again dictated by the nature of the DNS and the outcome is not different, if the domain name is written in capital letters in the URL. In any case, both “VIVARTIA” and “vivartia” have the same vocal effect.

As the disputed domain name is <vivartia.eu>, it is obvious that the disputed domain name is identical to the trademark, in which the Complainant has established to have rights.

Therefore, the Panel is satisfied that the Complainant has proved Article 21(1), first part of Regulation 874/2004 and Paragraph B11(d)(1)(i) of the ADR Rules.

4. Registration without rights or legitimate interest in the name

The Complainant has contended that the disputed domain name has been registered by the Respondent without rights or legitimate interest in the name, as laid out in Article 21(2) of Regulation 874/2004, making out a prima facie case of lack of rights or legitimate interest on the part of the Respondent. In doing so, the burden of proof shifts to the Respondent to present rebuttal evidence. The Respondent failed to bring circumstances to the attention of the Panelist indicating that the Respondent has any rights or legitimate interest in the name.

Indeed, the Panel attempted to access the URL http://www.vivartia.eu on several occasions since the transmission of the case file to the Panel and it appears that the disputed domain name has not been put to use in connection with the offering of goods or services, the Respondent has not been commonly known by the domain name and the Respondent is not making a legitimate and non-commercial or fair use of the domain name.

The only point that was raised by the Respondent was the alleged generic nature of the domain name, which is a point addressed under 3.4 in this decision. The decision cited by the Respondent in view of the issue of generic nature, WIPO Case No. D2006-0001, is read in a misconceived manner by the Respondent and is not relevant here. The circumstances of the case were very different from the ones present here. It suffices to say that the case concerned the registration of the domain name <post.com> for the offering of, inter alia, e-mail addressing services, to which the German Post, Deutsche Post AG, objected.

In light of the Complainant's contentions, the Respondent failed to substantiate rights or legitimate interest in the name, as laid out in Article 21(2) of Regulation 874/2004.

Therefore, the Panel is satisfied that the Complainant has proved Article 21(1)(a) of Regulation 874/2004 and Paragraph B11(d)(1)(ii) of the ADR Rules.

5. Registration or use in bad faith

Although Article 21(1) of Regulation 874/2004 is worded disjunctively requiring either the registration of the disputed domain name without rights or legitimate interest on the part of the Respondent OR the registration or use of the domain name in bad faith, for the sake of completeness the Panelist will examine whether circumstances have been brought forward indicating that the disputed domain name has either been registered or is being used in good faith.

The Complainant contends that the disputed domain name was registered in bad faith in the sense of Article 21(3)(a) or, in the alternative, Article 21(3)(b) and/or Article 21(3)(d).

The Respondent contends that it was never the intention of the Respondent to violate other parties' rights. The Respondent contends that on the day of the registration of the disputed domain name, i.e. May 9, 2006, the Respondent checked the .com and .gr domains for conflicting rights and contends that the domain names <vivartia.com> and <vivartia.gr> belonged to two different individuals. This may or may not be true, in the absence of evidence submitted, and, in any case, does not help Respondent's case, as the Respondent did not seem to check the records of the competent authority of the Greek Ministry of Development for conflicting trademark applications. Online search is possible and the Respondent, being a Greek resident could easily have checked this before processing the domain name registration in order to avoid "future dispute issues with existing legal owners."

The Respondent contends that the registration of the disputed domain name, which incorporates Complainant's applied word mark, on the same day, when the trade name and distinctive title change were announced by the Complainant to the public is a "big coincidence". Taking into account the fact that the Respondent concedes to registering domain names on the basis of advice and recommendations of "name generating companies and various registrars" and also concedes to offering to sell the domain name to the Complainant "at a "symbolic" price in order to make the transfer official", the Panel is satisfied that the Respondent registered the domain name in bad faith in the meaning of Article 21(3)(a) of Regulation 874/2004.

Therefore, the Panel is satisfied that that the Complainant has proved Article 21(1)(b) of Regulation 874/2004 and Paragraph B11(d)(1)(iii) of the ADR Rules.

The Panel is also satisfied that the Complainant, as a Société Anonyme with registered seat in Greece, satisfies the general eligibility criteria for registration set out in Article 4(2)(b) of Regulation (EC) No 733/2002.

DECISION

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

the domain name <vivartia.eu> be transferred to the Complainant

Foteini Papiri
Sole Panelist
Dated: March 12, 2007

PANELISTS

Name	Foteini Papiri

DATE OF PANEL DECISION 2007-03-12

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant launched an ADR Proceeding against the Respondent in respect of the domain name <vivartia.eu>. The Complainant contended that the Complainant applied for the Greek word mark "VIVARTIA" on March 9, 2006 and the Community word mark "VIVARTIA" on March 10, 2006, well before the registration of the disputed domain name by the Respondent on May 9, 2006. The

Complainant also contended that it announced the change of its trade name to “VIVARTIA Industrial and Commercial Company of Food Products and Catering Services Société Anonyme” and its distinctive title to “VIVARTIA S.A.” at an internal event on May 8, 2006 and to the public on May 9, 2006.

According to Articles 21(1) and 22(11) of Regulation 874/2004 and Paragraph B11(d)(1), in order to be granted the remedy sought, the Complainant bears the burden of proving that:
1. the domain name is identical or confusingly similar to a name in respect of which a right is recognized or established by the national law of a Member State and/or Community law and; either
2(a). the domain name has been registered by the Respondent without rights or legitimate interest in the name; or
2 (b). the domain name has been registered or is being used in bad faith.

In the absence of conclusive evidence put forward by the Complainant, the Panel is not satisfied that the Complainant has established that trade name and/or distinctive title rights existed in the trade name “VIVARTIA Industrial and Commercial Company of Food Products and Catering Services Société Anonyme” and/or the distinctive title “VIVARTIA S.A.” at least prior to the registration of the disputed domain name.

However, the Panel accepts that Complainant’s Greek trademark application of March 9, 2006 for the word mark “VIVARTIA” constitutes a recognized right under the doctrine of expectation of rights in Greece, irrespective of the fact that the trademark was not registered before the registration of the disputed domain name by the Respondent.

As the Panel is satisfied that the requirements of Article 21(1) of Regulation 874/2004, Paragraph B11(d)(1) of the ADR Rules and Article 4(2)(b) of Regulation (EC) No 733/2002 are met, the Panel orders that the domain name <vivartia.eu> be transferred to the Complainant.