Panel Decision for dispute CAC-ADREU-004288

Case number	CAC-ADREU-004288
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Domain names	mapy.eu

Case administrator

Name	Tereza Bartošková

Complainant

Organization / Name	MAPY

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

There are no other legal proceedings of which the Panel is aware.

FACTUAL BACKGROUND

A. History of the Request for Registration

On 6th of April 2006 MAPY (hereinafter “the Complainant”) filed request for the registration of the domain name <mapy.eu> (hereinafter “the Domain Name”) within part two of the phased registration period.

The Complainant claimed the following prior right for the application: Company names, Trade Names and Business Identifiers – Czech Republic.

On 18th of April 2006 the Complainant submitted documentary evidence to substantiate the existence of the prior right claimed over the name. The documentary evidence was a Certificate given by the Ministry of the Interior of the Czech Republic in Czech language, dated March 28, 2006.

EURid (hereinafter “the Respondent”) rejected the Complainant´s request for registration on 5th of January 2007 on the grounds that the documentary evidence did not demonstrate that the Complainant was the holder of the claimed prior right on the Domain Name.

B. History of the ADR Proceeding

On 14th of February 2006 at 20:03:20 the Complainant filed a Complaint with the Czech Arbitration Court (hereinafter “CAC”) to contest EURid’s decision to reject the registration of the Domain Name. The language of the proceedings is English. The annexes of the Complaint consist of the same Certificate which the Complainant submitted as the documentary evidence, e-mail messages from EURid, a letter from the Ministry of the Interior and a Power of Attorney form with no signature. English translation is not enclosed to any of the annexes.

In response to Complainant’s request to the CAC to require EURid to disclose the documentary evidence as defined in the .eu Registration Policy and Terms and Conditions for Domain Name Applications made during the Phased Registration Period (hereinafter “Sunrise Rules”), the Respondent disclosed the documentary evidence on 6th of April 2007.

The formal date of the commencement of the ADR Proceeding is 10th of April 2007. The CAC notified EURid of the Complaint and invited the Respondent to issue its Response within 30 working days from the delivery of the notification.

On 8th of May 2007 the Respondent filed its Response with the CAC.

On 14th of May 2007 the Complainant filed a Non-standard Communication with the CAC with an English translation of the letter from the Ministry of Interior filed with the Complaint.

On 29th of May 2007 the Complainant filed another Non-standard Communication with the CAC.

A. COMPLAINANT

The Complainant based its claim to the following grounds. The Complainant is the holder of a prior right, recognized by the Czech Ministry of the Interior. The Complainant has provided EURid with the Certificate of the Complainant's incorporation with the Ministry of the Interior of the Czech Republic, dated 28 March 2006, with the incorporation kept on file under reference number VS/1-1/63 665/E, Business ID. No. 270 27 503.

According to the Certificate provided, on 22nd of March 2006 the Complainant submitted to the Ministry of the Interior of the Czech Republic an application for the incorporation of MAPY, an organization of employers, by virtue of which, pursuant to Section 9a of Act No. 83/1990, Coll., on association of citizens, as amended, the Complainant became a legal entity with full legal capacity on 23 March 2006, i.e. as of the day following the day of the incorporation application being served.

On 6th of December 2006 the Complainant received a letter from the Ministry of the Interior of the Czech Republic concerning the legal capacity of trade-union and employer organizations. This letter specifies the conditions under which trade-union organizations and employer organizations become legal entities and what are the certificates the Ministry of the Interior issues to demonstrate this.

The Complainant asked EURid to carry out an internal review of the rejection. On 5th of January 2007 EURid informed the Complainant that the internal review was carried out, upholding the rejection.

EURid's decision on the rejection was made in contradiction with .eu Sunrise Rules, as the reasons indicated by EURid is totally inconsistent with .eu Sunrise Rules, as well as with the body of laws of the Czech Republic governing the establishment, incorporation and existence of the legal entity / Complainant.

According to the Czech Republic's legislation, at the time of the application being filed the Complainant was a legal entity with full legal capacity. The application was filed during the Sunrise Period when applications could be filed by applicants whose names correspond to the domain names they are applying for (Section 16(1) of .eu Sunrise Rules) and included the documentary evidence (Section 16(4) (iii) of .eu Sunrise Rules).

The application was the first one to arrive (Section 22(2) of .eu Sunrise Rules).

In his further statement the Complainant states that the letter from the Czech Ministry of the Interior, dated 28 March 2006, includes two sentences, not only one, as claimed by the Respondent. The second sentence, which the Respondent has omitted, reads as follows:

"Evidence byla provedena pod č. j. #číslo jednací#, IČO: #identifikační číslo#", which in English means: "The recording was made under the file number: #file number#, identification number: #id no#".

This sentence affirms that as of 28 March 2006 the Complainant had already been recorded, i.e. had been incorporated and fully existed as a legal entity. This is what the letter from the Czech Ministry of the Interior really communicates, the letter is not a mere certificate of the application for recording having been filed (i.e. certificate of the application having been received by the Czech Ministry of the Interior), as the Respondent appears to believe.

B. RESPONDENT

The Respondent rejected the Complainant's application on the grounds that the Complainant did not clearly and certainly demonstrate that he was the holder of the claimed prior right in the form of "Company names, Trade Names and Business Identifiers" protected in the Czech Republic. The burden of proof was on the Complainant to substantiate that he is the holder of the claimed prior right.

The Respondent referred to Articles 10 and 14 of the Regulation (EC) No 874/2004 as well as to Sections 11 and 21 of the Sunrise Rules.

The Complainant applied for the domain MAPY, which is a generic word meaning "maps" in the Czech language.

The documentary evidence consisted of a letter from the Czech Ministry of the Interior showing that the Complainant delivered to the Ministry of the Interior a proposal for recording of a company that would be called “MAPY”. Based on the documentary evidence received within the deadline, the validation agent found that the Complainant did not sufficiently demonstrate that it was the holder of a prior right on the name MAPY, which was in full force and effect on the date of the application.

The Complainant agrees that the letter from the Czech Ministry of the Interior (dated 28 March 2006) shows that the Complainant delivered to the Ministry of the Interior a proposal for recording of a company that would be called “MAPY” (or as translated by the Complainant in its Complaint “an application for the incorporation of MAPY”).

However, the Complainant argues that it was already a legal entity at the time of the application for the domain name MAPY (on 6 April 2007), because, according to the Complainant, the legal personality of the company dates back to the day following the day of the proposal for recording.

Identical ADR complaints have been filed of other similar Czech entities which applied for the registration of .eu domain names based on similar documentary evidence and for which the application was rejected by the Respondent based on the same grounds as in the present proceeding. Reference is made to the following cases: ADR 4281 <dotace.eu> (generic word meaning “subsidies” in the Czech language), ADR 4283 <hotely.eu> (generic word meaning “hotels”), ADR 4284 <hry.eu> (generic word meaning “games”), ADR 4286 <dovolena.eu> (generic word meaning “holiday”), ADR 4287 <ubytovani.eu> (generic word meaning “accommodation”), ADR 4289 <akcie.eu> (generic word meaning “equities”), ADR 4290 <zakony.eu> (generic word meaning “laws”); ADR 4291 <fondy.eu> (generic word meaning “funds”), ADR 4292 <zajezdy.eu> (generic word meaning “excursions”) and ADR 4293 <kurzy.eu> (generic word meaning “courses”).

It is 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 on the Complainant to substantiate that it was the holder of a valid prior right at the time of the application [e.g. ADR 127 (BPW), ADR 219 (ISL), ADR 294 (COLT), ADR 551 (VIVENDI), ADR 984 (ISABELLA), ADR 843 (STARFISH), ADR 1931 (DIEHL, DIEHLCONTROLS), ADR 1518 (VANHOUTEN)].

In case ADR 1886 <gbg.eu> the Panel clearly summed up that "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".

The documentary evidence submitted is not a certificate of incorporation, as it only demonstrates that the Ministry received an application for the registration of the company MAPY. Such prima facie review does not clearly demonstrate that the company MAPY was duly incorporated on the day of the application for the domain name by the Complainant (ie 6 April 2006).

DISCUSSION AND FINDINGS

1. The relevant provisions

Article 10 (1) of the Commission Regulation (EC) No 874/2004 states: “‘Prior rights’ shall be understood to include, inter alia, registered national and community trademarks, geographical indications or designations of origin, and, in as far as they are protected under national law in the Member-State where they are held: unregistered trademarks, trade names, business identifiers, company names, family names, and distinctive titles of protected literary and artistic works.”

Article 14 of the Regulation 874/2004 states: "All claims for prior rights under Article 10(1) and (2) must be verifiable by documentary evidence which demonstrates the right under the law by virtue of which it exists. (…) 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 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. (…) If the documentary evidence has not been received in time or if the validation agent finds that the documentary evidence does not substantiate a prior right, he shall notify the Registry of this.”

Annex 1 to the Sunrise Rules requires for documentary evidence for Trade Names and Business Identifiers in the Czech Republic the following: “Documentary evidence as referred to in Section 16(5) of the Sunrise Rules.”

Annex 1 to the Sunrise Rules requires for documentary evidence for Company Names in the Czech Republic the following: “Documentary

evidence as referred to in Section 16(4) of the Sunrise Rules."

Article 22.11 (2) of the Regulation 874/2004 states: "In the case of a procedure against the Registry, the ADR panel shall decide whether a decision taken by the Registry conflicts with this Regulation or with Regulation (EC) No 733/2002."

Section 12 (1) of the Sunrise Rules states: "Unless otherwise provided under Sections 13 to 18 of these Sunrise Rules, the Applicant must submit Documentary Evidence containing
(i) an affidavit signed by a competent authority, legal practitioner or professional representative declaring that the type of Prior Right claimed by the Applicant is protected under the laws of the relevant member state, including (a) references to the relevant legal provisions, scholarly works and court decisions and (b) the conditions required for such protection; and
(ii) proof that the complete name for which a Prior Right is claimed meets all of the conditions set forth in such laws, including the relevant scholarly works and court decisions, and that such name is protected by the relevant Prior Right claimed.

Section 16 (4) of the Sunrise Rules states: "Unless otherwise provided in Annex 1 hereto, it shall be sufficient to submit the following Documentary Evidence for company names referred to under Section 16 (1):
a. an extract from the relevant companies or commercial register;
b. a certificate of incorporation or copy of a published notice of the incorporation or change of name of the company in the official journal or government gazette; or
c. a signed declaration (e.g. a certificate of good standing) from an official companies or commercial register, a competent public authority or a notary public."

Section 16 (5) of the Sunrise Rules states: "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): 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".

Section 21 (1) of the Sunrise Rules states: "On the instructions of the Registry, the Validation Agent appointed by the Registry shall verify:
(ii) whether the requirement for the existence of a Prior Right to the name claimed by the Applicant in the Application is fulfilled."

Section 21 (2) of the Sunrise Rules states: "The Validation Agent examines whether the Applicant has a Prior Right to the name exclusively on the basis of a prima facie review of the first set of Documentary Evidence received by the Processing Agent and in accordance with the provisions of these Sunrise Rules."

Section 21 (3) of the Sunrise Rules states: "The Validation Agent is not obliged, but it 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."

Article A 3 (c) of the ADR Rules states: "All documents including communications made as part of the ADR Proceeding shall be made in the language of the ADR Proceeding. The Panel may disregard documents submitted in other languages than the language of the ADR Proceeding without requesting their translation. Any communication by the Provider which, from its content, cannot be regarded as amounting to procedural documents (such as cover letters with which the Provider sends procedural documents or automatic system notifications generated by the Provider's application) shall be made in the language of the ADR Proceeding or in English."

2. Conclusions

PROCEDURAL ISSUES

Section 26 (1) of the Sunrise Rules states that an ADR proceeding against the Registry may be initiated within 40 days of a decision by the Registry. The contested decision was made on 5 January 2007 and the Complaint was submitted on 14 February 2007. The Complaint was therefore submitted within the deadline and is admissible.

Based on Section B (8) of the ADR Rules, the Panel chooses to admit the Complainant's further statements of May 14th and May 29th, submitted as Non-standard Communications. For the reasons set out below, the Panel chooses not to request or admit a counter statement from the Respondent, since a counter statement is not required to ensure the equality of treatment (Section B 7(b) of the ADR Rules).

The Panel also notes that the annexes of the Complaint were not supported with English translations, even though the language of the proceedings is English and all documents shall be translated into English, in order to be taken into account by the Panel. As English translations of the relevant annexes were submitted in the Respondent's response and Complainant's further statements, considered admissible above, the Panel does not feel necessary to request further translations.

SUBSTANTIVE ISSUES

This Panel wants to stress the point, that following Article 22.11 of the Regulation 874/2004 the ADR Panel shall decide whether the decision at hand taken by the Registry conflicts with Regulation 733/2002 or Regulation 874/2004. Therefore, the Panel considers it has to assess whether there is "documentary evidence which demonstrates the right under the law by virtue of which it exists" under Article 14 of Regulation 874/2004.

It is the Panel's view that for showing prior rights the applicant has to submit documentary evidence to show that he is the holder of the prior right claimed on the name in question within forty days from the submission of the application. Although the applicant is allowed to submit additional evidence, this only is true, if the additional evidence will be submitted within the forty day period since the submission of the application. This view is also supported by the first-come-first-served principle.

The letter from the Ministry of the Interior concerning the legal capacity of a trade-union or employer organization dated 6th of December 2006, attached to the Complaint and not to the application, is not admissible as proof of the claimed prior right as the Registry and the Panel may only consider if the documentary evidence attached to the original application and filed within the 40-day time limit, proved the claimed prior right. Documents that were not part of the documentary evidence submitted for this application may not be considered as documentary evidence to establish the claimed prior right. Only the documentary evidence which the Respondent was able 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 No. 00294 <colt.eu>, No. 00954 <gmp.eu>, No. 01549 <epages.eu>, No. 01674 <ebags.eu>, No. 02124 <exposium.eu> etc.).

From the wording of Regulation 874/2004 it is clear, that the evidence that shows the prior right claimed must be a documentary evidence and must show that the applicant is the holder of the prior right claimed on the name in question. Unfortunately, this is not what the Certificate submitted solely as documentary evidence explicitly and clearly says without further research. For applications made during the 1st and 2nd phase of the sunrise period, the first applicant in the line does not have an unconditional right to the domain name, but only has the first opportunity to try to clearly demonstrate that it is the holder of the claimed prior right.

As stated in the regulations and judicated in previous decisions, the burden of proof to demonstrate that the Complainant is the holder of claimed prior right was with the Complainant. The validation agent examines whether the applicant has the claimed prior right to the name exclusively on the basis of a prima facie review of the first set of documentary evidence received.

Taking in consideration the wording of the Certificate as the only submitted documentary evidence, the validation agent was not able to conclude (with no doubt) that this document should be, or should serve as, certificate of incorporation confirming the full validity of the registration and incorporation of a trade-union or employer organization.

According to the Complainant, under Czech law, the company was legally in existence as of 23 March 2006. Further, according to the Complainant, the validation agent, the Respondent and this Panel should be aware of that provision of Czech law.

It is true that the submitted document contains also the reference to Section 9a of the Act. No. 83/1990 Coll. on association of citizens. The validation agent is, however, not obliged to conduct its own investigations in order to ensure fulfilling of the requirements.

The Complainant has misunderstood who bears the burden of proof related to sunrise applications. The burden was on the Complainant to provide ALL required evidence. Sections 16 (4) and 16 (5) of the Sunrise Rules include the requirements for documentary evidence. Annex 1 of the Sunrise Rules does not provide for exceptions to the above rule for the Czech Republic. The Complainant failed to include required proof showing that the name of an employer organization, for which the name MAPY was applied for, is protected by national law in a way prior rights must be protected, in order to be eligible for the application of a .eu domain name during the phased registration period.

The Complainant did not provide sufficient proof of the claimed prior right, and states that it was and is not possible to provide any specific extracts. In that case, the general provisions found in Section 12(1) of the Sunrise Rules apply, and the Complainant should have provided "(i) an affidavit signed by a competent authority, legal practitioner or professional representative declaring that the type of Prior

Right claimed by the Applicant is protected under the laws of the relevant member state, including (a) references to the relevant legal provisions, scholarly works and court decisions and (b) the conditions required for such protection; and (ii) proof that the complete name for which a Prior Right is claimed meets all of the conditions set forth in such laws, including the relevant scholarly works and court decisions, and that such name is protected by the relevant Prior Right claimed."

In other words, the Complainant should have included with the application, at the minimum, a letter from the Ministry of the Interior with similar content as the letter of 6th December 2006 (which date is beyond the 40-day period), evidence that the Complainant is an "employer organization" (which appears to be a requirement under the cited law) and a legal opinion supporting the Complainant's interpretation of the Czech law.

The Panel does not accept that the second sentence of the letter from the Czech Ministry of the Interior, dated 28 March 2006, means what the Complainant contends it to mean. If the document meant that MAPY 'had been incorporated and fully existed as a legal entity', it would have been the easiest thing for the document to say so, which it does not. Having regard to the translations, the Panel is not persuaded that the document means anything other than that the application itself has been recorded.

The Complainant returned to this issue in his further statement and argued: "This sentence demonstrates that the legal entity has already been registered (recorded), as well as that the legal entity has come into existence. In the Czech Republic, the allocation of an identification number means that a legal entity has come into existence and possesses full legal capacity." It is suffice to say that the certificate does not say this at all or even words to that effect. The words contended for by the Complainant are nowhere to be found.

Furthermore, the letter in question dated March 28 2006 does not mentions the word 'company'. It does not seem to be indicating a company name and it certainly does not say that MAPY is a company name or that it is an official company name. It may well be the case that the body incorporated was not a company at all; if it were, it is to be noted that the certificate makes no reference to companies and does not purport to be part of the regulatory machinery relating to companies.

Neither the validation agent, nor EURid, have any obligation to investigate national legislation in order to interpret documentary evidence. Section 21(2) of the Sunrise Rules states that prior rights are to be assessed exclusively on the basis of a PRIMA FACIE review of the first set of documentary evidence received.

If the documentary evidence is not prima-facie crystal-clear, which is the case here, then the Registry shall reject the application and the Complainant must suffer the consequences of not having provided sufficiently clear documentary evidence.

Reference is made to the case ADR 1886 <gbg.eu> in which the Panel correctly stated: "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".

Prima facie, and even taking into account the second sentence cited by the Complainant in his non-standard communication, and the letter from the Ministry of the Interior (which states according to the English translation provided by the Complainant: "…the Ministry of the Interior issues a certificate of the application for incorporation…"), the documentary evidence merely confirms that a proposal to incorporate an employer organization called MAPY was filed and registered on 22nd of March 2006.

The only task for the Panel in these proceedings is to decide whether the decision at hand taken by the Registry conflicts with Regulation 733/2002 or Regulation 874/2004. These proceedings may not in any case serve as a "second chance" or an additional round providing applicants an option to remedy their imperfect original application that was rejected during the Sunrise Period.

Based on the above stated the Panel has no possibility but to consider that the rejection decision made by the Registry does not conflict with the EC Regulation No 733/2002 or No. 874/2004.

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	**Elina Koivumäki**

DATE OF PANEL DECISION 2007-06-07

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The case is about the requirements for sufficient documentary evidence in connection with a domain name application filed within the second part of the phased registration period and based on “Company names, Trade Names and Business Identifiers” in the Czech Republic.

The Complainant had filed as documentary evidence a Certificate from the Czech Ministry of the Interior confirming that an application for incorporation of an employer organization had been filed with and received by said Ministry. The Certificate further referred to Section 9a of Czech Act No. 83/1990, Coll. on association of citizens.

The Registry had rejected the application as said documentary evidence did not demonstrate that the Complainant was the holder of the claimed and valid prior right on the Domain Name.

The latter letter from the Ministry of Interior attached to the Complaint clarifying the registration process of an employer organization is not admissible as documentary evidence as it was not included in the documentary evidence filed with the validation agent within the 40-day period.

The Panel ruled that the Complainant’s documentary evidence had shown only that by the time the application was received it had made a proposal for the incorporation of the Complainant and not that the employer organization was incorporated and fully in force, and how it is protected by national law. This was insufficient to establish a prior right for the purposes of a sunrise application and the Complaint was denied.