Panel Decision for dispute CAC-ADREU-004291

Case number	CAC-ADREU-004291
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Domain names	fondy.eu

Case administrator

Name	Josef Herian

Complainant

Organization / Name	FONDY

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

None that is Panel aware of

FACTUAL BACKGROUND

The Complainant applied for the domain Fondy on April 6, 2006. The Complainant submitted documentary evidence on April 21, 2006, which is before the May 16, 2006 deadline.

Based on the documentary evidence received within the deadline, the validation found that the complainant did not sufficiently demonstrate that it was the holder of a prior right on the dame FONDY.

Based on these findings, the Respondent rejected the Complainants application. The Respondent informed the Complainant about the rejection on October 31, 2006.

A. COMPLAINANT

The Complainant contends that it provided the Respondent with sufficient documentary evidence.

The Complainant filed with EURid a registration application for the domain name fondy.eu on 6 April 2006.

On 21 April 2006 he Complainant provided EURid with the Certificate of the Complainant's Incorporation with the Ministry of the Interior of the Czech Republic, dated 3 April 2006, with the incorporation kept on file under reference number VS/1-1/63 795/06-E, Business ID. No. 270 29 549, documenting the Complainant's Prior Right to the domain name.

According to the Certificate provided, on 17 March 2006 the Complainant submitted to the Ministry of the Interior of the Czech Republic an application for the incorporation of FONDY, an organization of employers, with its registered office at Bolevecká 34, Plzeň, 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 18 March 2006, i.e. as of the day following the day of the incorporation application being served,

On 3 November 2006 EURid informed the Complainant by e-mail that the application of 6 April 2006 for the domain name fondy.eu was rejected, indicating the following reasons: "The documentary evidence we have received does not sufficiently proves the proprietary rights on the basis of which the domain name has been claimed." ("Písemný důkaz který jsme obdrželi dostatečně nepotvrzuje vlastnická práva na základě kterých je žádáno doménové jméno")

On 6 December 2006 the authorized representative of the Complainant received a notification from the Ministry of the Interior of the

Czech Republic concerning the Legal Capacity of Trade-Union and Employer Organizations. This notification 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 of the application under consideration,

On 5 January 2007 EURid informed the Complainant by e-mail that the internal review was carried out, upholding the rejection of the application dated 6 April 2006. In addition, EURid advised that the 40-day period for initiating the ADR Proceeding had started.

The EURid's decision on the rejection of the Complainant's application for the domain name fondy.eu was made in contradiction with .eu Sunrise Rules, as the reasons indicated by EURid – "The documentary evidence we have received does not sufficiently proves the proprietary rights on the basis of which the domain name has been claimed." ("Písemní důkaz který jsme obdrželi dostatečně nepotvrzuje vlastnická práva na základě kterých je žádáno doménové jméno") – 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. In addition, there exist no grounds for the domain name fondy.eu not being registered in the Complainant's name on the basis of the above-specified application, according to the fact that:

- 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 above-specified application for the domain name was filed during the Sunrise Period when, on the basis of a Prior Right, applications could also be filed by the applicants whose names correspond to the domain names they are applying for (the Complainant's name is "FONDY") – Section 16(1) of .eu Sunrise Rules,
- The above-specified application was filed with EURid duly and in time and included documentary evidence proving the existence of the Prior Right (authenticated copy of the Certificate from the Ministry of the Interior of the Czech Republic proving the Complainant's incorporation, issued on 3 April 2006) – Section 16(4) (iii) of .eu Sunrise Rules,
- Of all the applications for the domain name in question which demonstrated a Prior Right to the domain name, the above-specified application was the first one to arrive ("first come, first served principle") – Section 22(2) of .eu Sunrise Rules,

The Complainant in it further communication disputed relevance of ADR 04281 (DOTACE), ADR 4289 (AKCIE), ADR 4292 (ZAJEZDY) and ADR 04293 (KURZY), issued in similar cases and reminded the court about the fact that in similar case ADR 4284 (HRY), the Complaint was accepted.

B. RESPONDENT

Respondent notes that the Complainant's authorized representative (Mr Jan Hřebíček) filed identical ADR complaints on behalf 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.

One of these other ADR proceedings has already been decided (ADR 04281 DOTACE, which is a generic word meaning "subsidies" in the Czech language). The Respondent refers to this decision in its totality as a highly relevant precedent, since it is based on an identical complaint, on similar facts and on similar documentary evidence.

Nine other cases are currently pending :
- 04283 HOTELY (which is a generic word meaning "hotels" in the Czech language);
- 04284 HRY (which is a generic word meaning "games" in the Czech language);
- 04286 DOVOLENA (which is a generic word meaning "holiday" in the Czech language);
- 04287 UBYTOVANI (which is a generic word meaning "accommodation" in the Czech language);
- 04288 MAPY (which is a generic word meaning "maps" in the Czech language);
- 04289 AKCIE (which is a generic word meaning "equities" in the Czech language);
- 04290 ZAKONY (which is a generic word meaning "laws" in the Czech language);
- 04292 ZAJEZDY (which is a generic word meaning "excursions" in the Czech language); and
- 04293 KURZY (which is a generic word meaning "courses" in the Czech language).

3.2 The burden of proof was with the Complainant to demonstrate that it is the holder of the claimed prior right

Article 10 (1) of the Regulation states that only the holders of prior rights shall be eligible to apply register domain names during the period of phased registration.

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 on the Complainant to substantiate that it was the holder of a valid prior right at the time of the application (see for example cases 127 (BPW), 219 (ISL), 294 (COLT), 551 (VIVENDI), 984 (ISABELLA), 843 (STARFISH), 1931 (DIEHL, DIEHLCONTROLS)).

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".

3.3 The documentary evidence received did not demonstrate that the Complainant was the holder of a valid prior right at the time of the application

As already mentioned, article 10 (1) of the Regulation states that only the holders of prior rights shall be eligible to register domain names during the period of phased registration and article 14 of the Regulation places the burden of proving such prior rights on the applicant.

The applicant is clearly required, pursuant to section 11.3. of the Sunrise Rules, to demonstrate that its claimed prior right is valid at the time of the application, which means that it must be “in full force and effect".

It is also reminded that section 21.2 of the Sunrise Rules states that “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 and scanned by the Processing Agent (including the Documentary Evidence received electronically, where applicable) and in accordance with the provisions of these Sunrise Rules”.

The documentary evidence submitted by the Complainant consisted of a letter from the Czech Ministry of the Interior (dated 3 April 2006) stating that the Complainant delivered to the Ministry of the Interior a proposal for recording of a company that would be called “FONDY” (or as translated by the Complainant in its Complaint “an application for the incorporation of FONDY”).

For the complete information of the Panel, the Respondent prepared a translation of this letter, which is attached to the present response.

From this document, the Panel will be able to conclude that :
this document is not a certificate of incorporation,
a prima facie review of this document only demonstrates that the Ministry received an application for the registration of the company FONDY,
such prima facie review does not clearly demonstrate that the company FONDY was duly incorporated on the day of the application for the domain name by the Complainant (ie 6 April 2006).

Consequently, the Respondent correctly decided to reject the Complainant's application.

The Respondent refers to the ADR decision 04281 (DOTACE), which, as already explained, constitutes a highly relevant precedent for this proceeding.

The Panel in this case decided that :

“The documentation submitted by the Complainant, according to the English translation (as provided by the Respondent), is a proposal for the recording of DOTACE as a company. It is dated 3 April 2006 and confirms that a proposal for recording DOTACE as a company was delivered to the Czech Ministry of the Interior on 21 March 2006.

To establish Prior Rights in the domain name dotace.eu, by way of a company name, the Complainant is required to demonstrate that the company of that name was fully incorporated at the date of making the application, i.e. 6 April 2006.

It is apparent that the letter merely confirms that a proposal to incorporate DOTACE was filed on 21 March 2006. This is not sufficient to demonstrate that the Complainant was the holder of a Prior Right (i.e. that DOTACE was fully incorporated) on 6 April 2006, the date on which the application was received by EURid.

The Complainant makes a number of submissions relating to the date on which DOTACE became a legal entity. The Complainant submits that, according to Czech law, DOTACE became a legal entity (and was therefore capable of claiming a Prior Right) on 22 March 2006, before the date on which the application was filed. However, this is not what the certificate submitted to the Respondent says.

The burden of proof is on the Complainant to demonstrate that the Prior Right in the name DOTACE exists, and the Complainant is required to submit documentary evidence showing that it is the holder of such Prior Right. The onus is on the Complainant to demonstrate to the validation agent that it is the holder of a Prior Right which is “in full force and effect”.

It was not for the validation agent to carry out further investigations to determine whether a proposal to incorporate a company under the name DOTACE had been approved. Section 21.2 of the Sunrise Rules states that Prior Rights are to be assessed by the validation agents exclusively on the basis of a prima facie review of the first set of documentary evidence received.

On 6 April 2006, the date on which the Complainant made the application for registration of the domain name, the Complainant’s proposal for recording of DOTACE remained only a proposal. At this time there was no certainty that DOTACE would be successfully incorporated. Accordingly, the evidence submitted by the Complainant did not demonstrate that DOTACE had been incorporated on 6 April 2006, the date on which the application for dotace.eu was received by the Respondent”.

In addition, the Respondent refers, by analogy, to the numerous decisions dealing with trademarks applications which were not yet registered at the time of the application.

For example, in ADR 1518 (VANHOUTEN), the Panel decided that: “The documentary evidence, which the Complainant sent to the Respondent, did only consist of a trademark application, and a license agreement regarding the rights to this application. This evidence does not meet the requirements in the Regulation, and is therefore not sufficient evidence to prove a prior right to the domain name. The fact that the trademark is now registered does not change the Panel’s view hereof”.

For these reasons, the Respondent's decision to reject the Complainant's applications does not conflict with the Regulation and the complaint should be denied.

DISCUSSION AND FINDINGS

The language of the present proceedings is English. According to Art. A 3 (c) ADR Rules, “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”. The Complainant posted five documents as Annex to his Complaint written in Czech, without attaching a translation in English. By doing so, it disregarded the requirement set forth in Art. A 3 (c) ADR Rules, which is the reason why this Panel will not take into consideration any of the documents aforementioned [see also case 1542 (MEGAMAN)].

Pursuant to Art. B 8 of ADR Rules, the Panel may request or admit, in its sole discretion, further statements or documents from either of the parties. In the present case the complainant filed two additional documents by means of non standard communication; in the first one he stated that the decisions in ADR 04281 (DOTACE), ADR 4289 (AKCIE), ADR 4292 (ZAJEZDY) and ADR 04293 (KURZY), issued in similar cases, are incorrect. In the second one he stated that On 7 June 2007, in a similar case, HRY (ADR 4284), the Complaint was accepted.
Given the fact that the Respondent had had sufficient time in order to arrange for a rebuttal, even though it did not make use of the above, admitting the additional pleadings of the Complainant does not contravene the principle of equal treatment of the parties involved. For this reason this Panel shall take into account the contentions included in the pleadings aforementioned, making use of the discretionary powers granted pursuant to Art. B 8 ADR Rules.
The procedure followed for the registration of company names during the so called Sunrise Period (chapter 4, phased registration according to Art. 10 et seq. of Reg. 874/2004) is of a similar nature to any other “prior rights” included in the above provision. The principles of the process for phased registration are stipulated in Art. 12 Reg. 874/2004. This pattern was obligatory until the 6th of April 2006 [for more details see Nolan / Mc Mahon, EverCloserUnion.eu, CRi 2006, p. 17 et seq.]
Pursuant to Art. 14.1 “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”. Further on, Art. 14.4 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".
The particular prerequisites of any application for a .eu domain name during the Sunrise Period are included in the Sunrise Rules, whose object and scope was "to ensure proper, fair, technically sound administration of the Phased Registration Period and set out the terms of registration, including the basic rules and procedures applicable to: (i) Applicants that, via a Registrar, file an Application, (v) the Validation Agents, when examining Documentary Evidence; (vi) the Registry, when deciding whether or not to register a Domain Name; (vii) Panellist(s) deciding on a Complaint against a decision of the Registry to register or not to register a Domain Name".
Of significant importance in this respect is chapter V of the Sunrise Rules, which deals with the validation of prior rights. Two provisions are crucial for the present case, namely Sections 12 and 16.

According to Section 12, "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 sets forth the requirements for the documentary evidence related to company names as follows: "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):
public.
(i) an extract from the relevant companies or commercial register;
(ii) 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
(iii) a signed declaration (e.g. a certificate of good standing) from an official companies or commercial register, a competent public authority or a notary

Such Documentary Evidence must clearly indicate that the name for which the Prior Right is claimed is the official company name, or one of the official company names of the Applicant".

Annex 1 to the Sunrise Rules contains no opposite provisions to Art. 16.4.

Last but not least, mention should be made to Section 11.3 Sunrise Rules, where it is clearly stated that "the Applicant must be the holder (or licensee, where applicable) of the Prior Right claimed no later than the date on which the Application is received by the Registry, on which date the Prior Right must be valid, which means that it must be in full force and effect".
Chapter VI of the Sunrise Rules covers the issue of the examination process. Pursuant to Section 21.2 "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 and scanned by the Processing Agent (including the Documentary Evidence received electronically, where applicable) and in accordance with the provisions of these Sunrise Rules".

Finally, with regard to the scope of the present proceedings, mention needs to be made to Art. 22.11 Reg. 874/2004, which stipulates that "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".

Bearing in mind the provisions aforementioned, the Panel will now proceed to the examination of the facts of the case at hand.
I. The Complainant's sole piece of documentary evidence was a certificate dated from April the 7th, issued from the Czech Ministry of the Interior. This certificate has the following wording:
Ministry of the Interior
#Address#
#file number# In Prague, 7 April, 2006

Certificate
The Ministry of the Interior hereby certifies that on 29 March 2006, a proposal for recording of
ZAKONY

Having its seat: #address#, in accordance with Art. 9a of the Act No. 83/1990 Coll. on association of citizens, wording of the Act No. 300.1990 Coll.

was delivered to the Ministry of the Interior.

The recording was made under the file number: #file number#, identification number: #id no#.

Taking into consideration that the Validation Agent conducts a prima facie review of documentary evidence, this Panel fails to detect any potential negligent behavior coming from his side. The document clearly mentions twice the word “recording”. In particular, the Panel understands that a
proposal for recording was filed on March the 29th 2006, and that this (proposal or petition or application) for recording received a file and identification number. What is missing from this certificate is an explicit reference to the word “company”, which would give rise to a different approach of the subject matter. However, since such a word is not contained in the (translated) document, this Panel sees no wrongdoing coming from the Validation Agent.
In his additional pleadings dated from 14.5.2007, the Complainant underlines the importance of Art. 9a of the Act No. 83/1990 Coll. on association of citizens, wording of the Act No. 300.1990 Coll., and attaches a translated copy of a letter issued by the Ministry of the Interior – Department of Association, dated from 7.12.2006. This letter acknowledges that:

“Pursuant to the stipulations of Section 9a of Act No. 83/1990, Coll., on association of citizens, as amended by Act 300/1990, Coll., a trade-union organization and an employer organization become legal entities as of the day following the day on which the competent ministry had received the application for its incorporation.
In order to document this, the Ministry of the Interior issues a certificate of the application for incorporation indicating other identification data such as name, registered office, reference and identification numbers of a trade-union organization or an employer organization”.
Even that being the case, there are at least two very important factors that lead this Panel to uphold the Registry’s decision to reject the application.

The Complainant did not specify the meaning and the importance of this piece of national legislation to the Validation Agent during the 40 days period. Expecting from the Agent to proceed to a profound research regarding the wording of Section 9a of Act No. 83/1990 during the Sunrise Period would contravene the basic elements of the whole registration and validation system. It is the applicant himself who bears the onus of proving his prior right, by delivering clear-cut evidence [see cases 1518 (VANHOUTEN), 1542 (MEGAMAN), 1664 (ACCORD, TAARUP), 1943 (METZLER), 2050 (AUTOMOTOGAZETA etc), 2094 (DEBORAH etc.), 2119 (PHOENIX-X-RAY), 2138 (NOVUM), 2268 (EBSOFT), 2316 (MEDTRONIC), 2335 (FELA), 2412 (SCWP), 2564 (LINAGORA, TOOLINUX), 3503 (COBUMO etc.), where a similar approach is supported]. This was not the case in the present proceedings.
The letter presented before this Panel attached to the Complainant’s additional pleadings was not delivered to the Validation Agent as supporting document of his documentary evidence. Hence, this document is completely inadequate in the course of these proceedings, because the powers of this Panel are bound by Art. 22.11 Public Policy Rules, which means that the Panel cannot review the decision of the Registry by taking into consideration documents, which were not brought into its attention, when dealing with the specific application. A large number of decisions have already established a case law rule under .eu ADR proceedings, namely that new evidence presented for the first time before the Panel, i.e. not within the 40 days period, as required by Art. 14 Reg. 874/2004, are to be held inadmissible [see cases 1518 (VANHOUTEN), 1943 (METZLER), 2013 (NINTENDO), 2022 (ETAS), 2055 (ABOUTLEARNING, 4MAT), 2087 (PLEXTOR, PLEXTALK), 2094 (DEBORAH etc.), 2119 (PHOENIX-X-RAY), 2124 (EXPOSIUM), 2190 (WORLEE)].

As judicated many times, the burden of proof to demonstrate that the Complainant is the holder of claimed prior right was with the Complainant.

During the Sunrise Rules, the first applicant in the line does not have an unconditional right to the domain name, but only has an opportunity to try to clearly demonstrate that it is the holder of a prior right.
According to Section 21.2 of the Sunrise Rules, 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 and scanned by the Processing.
This Panel refers to the case 4284 (HRY), where the Panel came to the adverse conclusion and accepted the Complaint. The difference in this case is, that the panelist decided to perform his own research and through his own investigation confirmed certain details which the Complainant have not proven before the deadline. This Panel considers such approach as inappropriate and emphasises that any previous decision is not legally binding for its conclusions
Finally, this Panel refers to 9 decisions of the CAC, which are of striking resemblance to the present case. These are the following: 4281 (DOTACE); 4283 (HOTELY); 4286 (DOVOLENÁ); 4287 (UBYTOVÁNÍ); 4288 (MAPY); 4289 (AKCIE); 4290 (ZÁKONY); 4292 (ZAJEZDY), and 4293 (KURZY). All of them were filed by Mr. Jan Hřebíček, who acted as the authorized representative of the complainants. The facts in

those cases are almost identical to the present one, and the legal issues dealt with are exactly the same. None of the above cases declined from the findings of the present decision.

Taking in consideration all above mentioned the Panel finds that the Respondent correctly and in line with all applicable regulation decided to reject the Complainants application.

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	Martin Maisner

DATE OF PANEL DECISION 2007-07-24

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant asked to annul Respondent's decision on the rejection of the Complainant's application for the domain name fondy.cz and order that Respondent grant this application to the Complainant.

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 Validation Agent is not obliged to conduct its own investigations into the circumstances of the Application, the Prior Right claimed and the Documentary Evidence produced except of "PRIMA FACIE" review.

During the Sunrise Rules, the first applicant in the line does not have an unconditional right to the domain name, but only has an opportunity to try to clearly demonstrate that it is the holder of a prior right.

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.