Panel Decision for dispute CAC-ADREU-004292

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Case administrator

Name	Josef Herian

Complainant

Organization / Name	ZÁJEZDY

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

Nil

FACTUAL BACKGROUND

The Complainant applied for registration of the domain name zajezdy.eu on 6 April 2006 under the phased registration (“Sunrise”) period. The Complainant’s application relied on the claim that it had a Prior Right to the name ZAJEZDY within the meaning of article 10(1) of Commission Regulation EC number 874/2004 (the “Regulation”) and in particular that it was a legal entity, namely a company, at the time of the application.

The Complainant’s application during the Sunrise period was correctly lodged and, pursuant to Article 14(4) of the Regulation, the Complainant submitted evidence on 21 April 2006 supporting the application. That evidence was in the form of a document from the Czech Ministry of the Interior dated 3 April 2006.

The validation agent found that the Complainant had not sufficiently demonstrated that at the time of the application it was the holder of a prior right to the name ZAJEZDY and, based on those findings, the Respondent rejected the Complainant’s application for the domain name.

The Complainant requested the Respondent to carry out an internal review of its decision, which the Respondent did and on 5 January 2007 it advised the Complainant that it upheld the rejection of the application.

A. COMPLAINANT

The Complainant submitted that

. the Respondent’s rejection of the Complainant’s application for the domain name was made in contradiction with the .eu Sunrise Rules on the basis that the Complainant had submitted sufficient evidence to demonstrate a Prior Right to the domain name.

. the document provided by the Ministry of the Interior of the Czech Republic, dated 3 April 2006 and submitted in support of the application was in fact a certificate of incorporation and according to that certificate ‘the Complainant became a legal entity with full legal capacity on 1 April 2006, i.e. as of the day following the day of the incorporation application being served’ , which was 31 March 2006 and hence prior to 6 April, 2006, the date of the application for registration of the domain name.

. a notification from the Czech Ministry of the Interior, which the Complainant received on 6 December 2006, specifying the conditions under which trade unions and employer organizations become legal entities in the Czech Republic and the certificates that the Ministry

of the Interior issues to demonstrate this, supported the same interpretation.

. accordingly, the Complainant had shown that it was the holder of the prior right claimed at the time of the application.

B. RESPONDENT

The Respondent submitted that

. the Prior Right claimed by the Complainant was in the company name.

. the burden of proof was on the Complainant to show that it was the holder of the claimed prior right at the time of the application for the domain name and that, at the time of the application, it was incorporated.

. the document provided by the Complainant did not show that ZAJEZDY had been incorporated on or before the day of the application for the domain name i.e. 6th April 2006.

. the document showed only that as at 6 April 2006 the Complainant had made an application for the incorporation of the Complainant and not that the Complainant was incorporated.

DISCUSSION AND FINDINGS

The issue that arises in these proceedings is a clear one that can be readily determined by an understanding and a proper application of the regulations that governed the application for the domain name.

They are the Commission Regulation (EC) No 874/2004 (the "Regulation") and the Rules known as .eu Registration Policy and Terms and Conditions for Domain Name Applications made during the Phased Registration Period (the 'Sunrise Rules').

Article 10(1) of the Regulation provides that during the period of phased registration or Sunrise period, the holders of prior rights recognized by national laws may apply to register domain names. It also provides that those prior rights include 'company names'.

Article 10(2) provides that "registration on the basis of a Prior Right shall consist of the registration of the complete name for which the prior right exists, as written in the documentation which proves that such a right exists."

Article 14 of the Regulation requires all claims for Prior Rights
evidence which demonstrates the right under the law by virtue of which it exists".

Article 14 also provides that 'The Registry, upon receipt of the application, shall block the domain name in question until validation has taken place or until the deadline passes for receipt of documentation.'

It also provides that the applicant is to 'submit documentary evidence that shows that he or she is the holder of the prior right claimed on the name in question.'

Section 11.3 of the Sunrise Rules requires that 'the Applicant must be the holder 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'.

A proper reading of those provisions makes several things clear. First, the Complainant was entitled to apply for the registration of its domain name during the Sunrise period on the basis that it had a prior right to a company name. Secondly, if it did so, it could succeed only if it proved that it had a prior right to the company name at the time it made its application. Thirdly, the proof required could only be effected by documentary evidence. Fourthly, because the basis of the claim was a company name, it follows that the applicant had to prove that the company existed at the time the application was received. Fifthly, it also had to prove that the prior right was 'valid, which means that it must be in full force and effect' and not merely inchoate, at the time the application was made.

Applying these principles to the facts of the present case, the Panel is of the opinion that the Complainant failed to make out its case and that the application was rightly rejected. That is so for the following reasons.

First, the burden of proof was clearly on the Complainant to prove all of the above elements and the Panel is not satisfied that the Complainant has done so.

In this regard, it should be stated at the outset that Article 14, among other things, provides that 'The Registry, upon receipt of the application, shall block the domain name in question until validation has taken place or until the deadline passes for receipt of documentation.' If the application were successful, this blocking action would in effect become permanent. The registration of the domain name that the Complainant was seeking by the prior rights process was thus a privileged one that would give it an advantage over all other applicants for the domain name in question. Given that it was a generic name that would otherwise be open to all comers, but denied to them if the Complainant were successful, the examining authorities and the Panel are therefore entitled to expect the clearest unequivocal evidence that the Complainant has proven the prior right it has claimed and that it is a genuine and substantive prior right. This Panel is not satisfied that the Complainant has made out that case.

Secondly, the most important matter that the Complainant had to prove was that it had the prior right that it claimed at the time the application was received. The factual history described by the Respondent shows that the application was received on 6 April 2006. It seems to be common ground, however, that the contentious evidence was received on 21 April 2006 and that this material was properly taken into account in determining the outcome of the application. Accordingly, the Complainant had to prove on the basis of that evidence that it had a prior right in the form of a company name at the time the application was received, i.e. on 6 April 2006. That is made plain by the wording of Articles 10(2) and 14 of the Regulation and Section 11.3 of the Sunrise Rules, all of which speak in the present tense and refer to the evidentiary proof of the prior right as at the time of the Application and none of which refer to that right being established as at any other time. Moreover, the latter provision went further and required proof that the prior right was 'in full force and effect' at the time of the application. The Complainant has not made out that case.

THE DOCUMENT OF 3 APRIL 2006

Thirdly, the evidence submitted by the Complainant at the time of its application fell well short of what was required. The Complainant says in the Complaint that its documentary evidence in support of the application for the domain name consisted of what it refers to as a 'Certificate of the Complainant's Incorporation' from the Ministry of the Interior of the Czech Republic dated 3 April 2006.

This Certificate is then said to have recorded that on 31 March 2006, the Complainant submitted to the Ministry 'an application for the incorporation of ZAJEZDY, an organization of employers…' although it did not provide with the Complaint an English translation of the document.

The Respondent has provided such a translation and on the basis of that translation it argues that the document is a 'letter' to the effect that the Complainant delivered to the Ministry 'a proposal for recording of a company that would be called "ZAJEZDY".'

Whatever is the correct description of the process initiated by the Complainant on 31 March 2006, it was at best an application for incorporation of the company. It is equally clear that the document dated 3 April 2006 is not a Certificate of Incorporation.

Accordingly, all that the Complainant submitted was evidence that it had applied for or proposed the incorporation of the body; it had not submitted any evidence that on or before 6 April 2006 the body was or had been incorporated.

This is not splitting hairs; those who drew and promulgated the regulations and who made it clear what procedure they wanted followed, are entitled to have the regulations applied as they are expressed.

To this, the Complainant says that the effect of the Czech law was that the body in question became incorporated on the day after the application or proposal was submitted and that it should therefore be accepted that the company was incorporated by 6 April 2006. That leads to the real issue in these proceedings, which is whether 'documentary evidence which demonstrates the right', which is the requirement of Article 14 of the Regulation is the same as documentary evidence that shows the right has been applied for together with the effect of the law under which that application has been made.

The Complainant is in effect arguing that they are the same thing. The Panel does not accept that argument for the following reasons.

First, to accept that interpretation is to negate the plain words of the regulations as to what documentary proof is required. It may be that the Complainant is correct in asserting that by Czech law, the body became a legal entity on 1 April 2006, being the day after the application for incorporation was lodged. The certificate it has submitted from the Czech Ministry of the Interior of 6 December 2006 certainly makes it plain that under Section 9a of the Act known as No. 83/1990, Coll., as amended by Act 300/1990, Coll., a trade union or employer organisation 'become legal entities as of the day following the day on which the competent ministry had received the application for its incorporation'.

But, against that, Articles 10(2) and 14 of the Regulation and Section 11.3 of the Sunrise Rules specify the evidence that is required. These provisions do not allow proof of the prior right by any means other than documentary proof that shows that the company 'is' incorporated at the time of the application for the domain name i.e., that the body is incorporated at the time the application for the domain name is made and not that it would have become registered on the day after the application for its incorporation or at any other time.

Moreover, if in fact, as the Complainant says, the company became incorporated by the effect of law on 1 April, it should have been a simple matter to submit on 6 April a certificate of incorporation to the effect that on or prior to 6 April the organisation was at that time an incorporated body.

Its absence is a significant omission from the Complainant's evidence that cannot be rectified without, in effect, ignoring the provisions of the Regulation and the Sunrise Rules.

Secondly, in interpreting legislation such as the regulations in question in this case, it is always a sound principle to consider what the authorities who drew the regulations intended. The answer is that it is clear from the structure of the scheme that what the authorities wanted was to enable decisions on prior rights to be made on the basis of documentary evidence showing the status of claimed rights at the time those documents were brought into existence. That intention would not be served if the Panel in the present proceedings decided that a prior right could be proved by a combination of documentary evidence and the effect of the law on an application that was only inchoate at the time the document was brought into existence, which is the correct description of the document of 3 April relied on by the Complainant.

Thirdly, as will be seen later in this decision, there are also some other provisions of the Sunrise Rules dealing with evidentiary requirements with which the Complainant did not comply.

THE DOTACE DECISION

As the Respondent points out, the decision in ADR Decision 04281 (DOTACE) is directly in point and is therefore relevant to the present consideration. In that decision the Panel on similar facts, including the fact that the Complainant is the same in both proceedings, said:

'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 7 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 EURid received the application.

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'.

The Panel will follow that decision because it is correct and it leads to the conclusion that in the present case, the Complainant's proofs in its application were deficient.

THE COMPLAINANT'S SUPPLEMENTAL SUBMISSION

The Complainant, however, subsequently submitted that the Respondent had quoted incorrectly from the DOTACE decision, in that, whereas the decision itself noted that the documentation the Complainant submitted to the effect that it had proposed on 21 March 'the recording of DOTACE as a company' was dated 7 April 2006, the Respondent's extract from the decision said it was dated 3 April 2006.

As will be seen from the above extract from the decision, the date is in fact 7 April 2006. So the Complainant is right about this, although it seems strange that the Complainant could submit on 6 April, the date on which the application for the domain name reached EURid, a document dated 7 April.

From this discrepancy in the dates the Complainant then argues:

'Thus, the document which is referred to was not issued until the application for registration of the DOTACE.EU domain name had been filed, which seems to have had a significant impact on the Panel Decision.'

In other words, the Complainant argues that, as its evidence that DOTACE was a company on 6 April was not brought into existence until 7 April, the Complainant might be said not to have shown on 6 April that DOTACE was a company on 6 April.

That enables the Complainant then to argue that:

'In these proceedings, the date of issue of a similar document (3 April 2006) precedes the date of the filing of the application for registration of the ZAJEZDY.EU domain name (6 April 2006).'

Accordingly, the Complaint argues in effect, although not in these words, that, although its case in DOTACE was weak, because it did not have a document proving incorporation by the date the application for the domain name was submitted to EURid, its present case is stronger because on the date it submitted its application to EURid for zajezdy.eu, namely 6 April, it did have a document showing that by that date ZAJEZDY was incorporated, because the document showed that the application for incorporation had been submitted on 31 March and by force of law ZAJEZDY was incorporated the following day, 1 April.

The Panel does not accept that argument. Section 11.3 of the Sunrise Rules requires that 'the Applicant must be the holder 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'.

Accordingly, the Complainant's proof must itself show that the prior right was in full force and effect at the time of the application and the Rules do not admit of adding to the documentary evidence conclusions of law which must necessarily depend on interpretation.

THE DOCUMENT FROM THE CZECH MINISTRY

The Complainant then argues that

'The letter from the Czech Ministry of the Interior, dated 3 April 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 3 April 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.'

However, the Panel does not accept that the letter means what the Complainant contends it to mean. If the document meant that ZAJEZDY '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 both translations, the Panel is not persuaded that the document means anything other than that the application itself has been recorded.

At a later point in the Complainant's further submission it returned to this issue and argued:

'However, the second sentence in the letter of confirmation from the Czech Ministry of the Interior stipulates that the recording procedure was carried out and that the Complainant came into existence.'

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.

THE COMPLAINANT'S CRITICISM OF THE DOTACE DECISION

The Complainant also criticises the DOTACE decision in the following way:

'In addition, the Panel Decision states that:

„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."

This statement is false. The fact of the proposal for the Complainant's incorporation having been approved is explicitly stated in the certificate provided, namely: "The recording was made under the file number: #file number#, identification number: #id no#."'

The statement in the DOTACE decision was not false, for it was not the function of the validation agent to search the Czech law to see what was the effect of making an application for the incorporation and when that incorporation can about.

THE COMPLAINANT'S OTHER CRITICISMS OF THE DOTACE DECISION

The Complainant has made several other criticisms of the use made by the Respondent of the DOTACE decision and several other criticisms of the decision itself.

The Panel has given careful consideration to all of those arguments. However, it accepts the Respondent's argument that the DOTACE decision is relevant to the present proceedings and that it is based on sound principles.

THE GENERAL ARGUMENT

Many of these arguments advanced by the Complainant misconceive the basic issue in this case which is whether its evidence proved the prior right that it claimed.

The Complainant maintains that the sole prior right that it claimed was that of a company name, which is one of the prior rights recognised by Article 10(1) of the Regulation. That being so, it was required to prove its entitlement to the prior right in the manner provided for in the Sunrise Rules. Those Rules provide for different means of proof depending on the particular type of prior right at issue. Section 16 provides with respect to company names that the method of proof is as follows:

'4. DOCUMENTARY EVIDENCE FOR COMPANY NAMES 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):

(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 public.

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.'

The Complaint specifically claims that the Complainant has brought itself within the provisions of 'Section16(4)(iii)' and it is therefore clear that the Complainant is relying on this and no other means of proving its prior right. The outcome of these proceedings will therefore be determined by whether or not the Complainant brought itself within that provision.

When that is understood and when the provisions of Section 16(4)(iii) are looked at, it is seen why the Complainant failed to make out is case. Section 16(4)(iii) can only mean that the acceptable means of proof is a signed declaration from one of the designated authorities that the body was, at the time declaration was made, a company and that its name was as claimed. The document submitted by the Complainant simply did not declare that the body was incorporated.

The Complainant maintains that the document it has supplied is the only one that can be obtained. That may be so, but the result is not that a deficient document must be accepted by the Respondent as evidence of the prior right. The result is that the Complainant did not establish what the Sunrise Rules clearly required it to establish, namely that the body was incorporated as at the time the document was created.

Even if the view just expressed is not correct, the final provision of Section 16(4) must be given effect to and is fatal to the Complainant's position. That provision is that:

'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.'

The document of 3 April 2006 that is relied on does not meet that requirement. It nowhere mentions the word 'company', it does not purport to be indicating a company name and it certainly does not say that ZAJEZDY is a company name or that it is an official company name.

Indeed it may well be that the body incorporated was not a company at all; if it were, it is curious that the certificate makes no reference to companies and does not purport to be part of the regulatory machinery relating to companies. It may well be that the body was an incorporated association or some other form of statutory corporation other than a company.

But whether it is a company or not, it is clear that the documentary evidence does not comply with the requirements of Section 16(4) of the Sunrise Rules.

The requirements are clear and they have not been met.

CONCLUSION

Accordingly, the Respondent was right to reject the Complainant's application and to do so does not conflict with the Regulation. The Complaint should therefore be denied.

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	Neil Anthony Brown

DATE OF PANEL DECISION 2007-05-17

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant in this case did not show that, at the time it made its Sunrise Application, it was the holder of a Prior Right which was in full force and effect. Specifically, the Panel ruled that the Complainant's evidence had shown only that by the time the application was received it had made a proposal for the incorporation of the Complainant as a company and not that the company was incorporated.

This was insufficient to establish a Prior Right for the purposes of a Sunrise Application.