

Decision of the European Ombudsman on complaint 977/2006/IP against the European Commission

Decision

Case 977/2006/IP - Opened on 19/06/2006 - Decision on 05/09/2007

Strasbourg, 5 September 2007

Dear Mr P.,

On 3 April 2006, you submitted a complaint to the European Ombudsman against the European Commission.

On 19 June 2006, I forwarded the complaint to the President of the Commission. On 17 October 2006, the Commission sent me the translation of its opinion in Italian, which I forwarded to you on 23 October 2006 with an invitation to make observations by the end of November 2006. I received your observations on 16 November 2006.

On 26 April 2007, you sent me a letter asking to be informed about developments in your complaint. My services sent you a message on 30 April 2007 informing you that your complaint was still under examination. On 21 June 2007 you send a further message asking for information about your complaint. On the same date, my services informed you by e-mail that extra time would be necessary for the translation of my decision into Italian. In a further message, you expressed your thanks for the above information and asked to receive my decision also in English.

On 28 June 2007, my services contacted the Commission in order to obtain additional information that could be useful to you. The Commission replied on 9 July 2007.

I am writing now to let you know the results of the inquiries that have been made.

THE COMPLAINT

According to the complainant, the relevant facts are as follows.

In 1989, the complainant registered the trademark "iter" (1) . When .eu was created as a Top Level Domain ("TLD") (2) , the complainant wished to register the domain name iter.eu. However, since the domain name iter.eu had been reserved by the Commission for itself, his request was rejected.



The complainant wrote to the Representation of the Commission in Rome ("the Representation") in February 2006 to ask why the Commission was entitled to reserve for itself the domain name iter.eu. He pointed out that the Commission was already the owner of the domain name iter.org.

On 20 February 2006, the complainant received a reply from Mr D., the Director of the Representation. Mr D. forwarded to him some extracts of Commission Regulation No 874/2004 of 28 April 2004 (3) which establishes public policy rules concerning the implementation and functioning of the .eu TLD and the principles governing registration of domain names under the .eu TLD.

On 21 February 2006, the complainant wrote an e-mail to Mr D. asking to know how he could complain about the existing legislation. He considered that, since he had registered the trademark "iter", he had a more legitimate right than the Commission to obtain the domain name iter.eu. In addition, the complainant asked Mr D. for information about the purpose of the relevant Community legislation.

Despite a reminder sent to the institution on 6 March 2006, the complainant received no reply to his message of 21 February 2006 from the Commission.

The Ombudsman understood that, in his complaint to the Ombudsman, the complainant alleged that he had received no reply from the Commission to his message of 21 February 2006, despite a reminder sent to the institution on 6 March 2006.

The Ombudsman also understood that, in his complaint to the Ombudsman, the complainant claimed that the Commission should provide him with a reasoned reply to the issue that he had raised, that is, to know the reasons why the Commission was entitled to reserve to itself the domain name iter.eu, and should inform him of the purpose of Regulation 874/2004.

THE INQUIRY **The Commission's opinion**

The opinion of the Commission can be summarised as follows.

On 22 April 2004, Parliament and the Council adopted Regulation 733/2002 on the implementation of the .eu Top Level Domain (4) (the "Basic Regulation") (5) .

Article 7 of the Basic Regulation states that the Community, as a holder of the domain name, retains all the rights relating to the .eu TLD. Article 5(1) of the Basic Regulation states that the Commission "*(...) shall adopt public policy rules concerning the implementation and functions of the .eu TLD and the public policy principles on registration (...)*." In accordance with Article 5(1) of the Basic Regulation, on 28 April 2004 the Commission adopted Regulation 874/2004, article 9 of which allows the Commission to ask EURid (6) to introduce domain names directly under the .eu TLD for use by Community institutions and bodies.

Regulation 874/2004 establishes, *inter alia* , procedures for the reservation of names by Member States. It also allows holders of certain prior rights to apply for registration of



domain names before the general public. The period during which the holders of prior rights may apply for registration was known as the " Sunrise period".

During phase 1 of the Sunrise period, from 7 December 2005 to 7 February 2006, only domain names that corresponded to (i) registered community or national trademarks, (ii) geographical indications, (iii) the full name of a public body, (iv) the acronym by which a public body is commonly known and, if applicable, (v) the territory which is governed by a public body were eligible for registration by the public body or holder of the right. During phase 2 of the Sunrise period, from 7 February 2006 to 7 April 2006, it was possible to apply for domain names linked to (i) the names listed in phase 1; and (ii) other rights that are protected under the national law of the Member State where they are held. Such rights include (a) company names, (b) business identifiers, (c) distinctive titles of protected literary and artistic work, and (d) unregistered trademarks and trade names.

Article 22 of Regulation 874/2004 provides for an Alternative Dispute Resolution ("ADR") procedure which may be initiated by any concerned party against a decision taken by the EURid which is considered to be in conflict with the terms of the Basic Regulation or Regulation 874/2004.

Concerning the substantive aspects of the complaint, the Commission noted that, in February 2006, the complainant wrote to the Representation concerning the reservation of the domain name *iter.eu* by the European institutions. In his reply of 20 February 2006 to the complainant, the Director of the Representation provided the complainant with information concerning the legal basis for the reservation of domain names by European institutions and bodies and about the existence of the joint international research and development project ITER, of which the European Union is part.

In a further message of 21 February 2006 to the Director of the Representation, the complainant expressed his doubts about the legality of the reservation of this domain name by the European institutions and announced his intention to lodge an appeal against it. He also contested the right of ITER to have another domain name since it had already one, that is *www.iter.org*. The complainant argued that, on the basis of the trademark registered by him in 1989, he had a prior right over the name "iter".

In her response (7) to the complainant on behalf of the Director of the Representation, Mrs B. informed the complainant of the existence of an ADR procedure foreseen by Article 22 of Regulation 874/2004 and that this procedure could be initiated against, *inter alia*, decisions taken by the EURid. However, it appeared that the complainant did not receive the relevant message. Therefore, on 6 March 2006 he sent a reminder to the Director of the Representation. On 4 April 2006, the Director forwarded Mrs B's message to the complainant.

As regards whether the complainant had a prior right to the registration of the domain name *iter.eu*, the Commission stressed that the system created by the European legislator for the registration of domain names under the *.eu* TLD establishes an order of



precedence. Article 9 of the Basic Regulation gives the Commission the right to ask the EURid to introduce domain names directly under the .eu TLD for use by Community institutions and bodies.

According to the Commission, the complainant did not provide any evidence that he has a better right than the Commission as regards the registration of the domain name iter.eu, that is, he did not provide the registration number of the trademark which he claimed to have filed in 1989.

The Commission pointed out that, in any case, for a trademark holder to enjoy a right of priority to register a domain name, it would have been necessary to follow the procedure established for Sunrise's applications. To the Commission's knowledge, the complainant had not filed an application for registering his domain name during the Sunrise period.

Furthermore, the Commission emphasised that even if the complainant enjoyed a valid prior right to register a domain name, and even if he had applied for registering his domain name during the Sunrise period, this would not have automatically entitled him to obtain the corresponding .eu domain name. In sum, the existence of a prior right implies that the holder of the prior right has the "possibility" to apply for a domain name. This "possibility" does not, however, grant that third party an absolute right to obtain that domain name. An application for a domain name by the holder of a prior right is, in fact, subject to certain conditions. These conditions include, amongst others, that the domain name has not been reserved by the European Commission in accordance with Article 9(2) of the Basic Regulation. In the specific case of the domain name iter.eu, the domain name was already reserved by the Commission in accordance with Article 9(2) of the Basic Regulation.

It also appeared that the complainant did not make use of the ADR procedure.

Concerning the complainant's argument that the Commission had no legitimate right to register the domain name iter.eu, given that it had already registered the domain name iter.org, the Commission pointed out that this argument was not legally sound. The rules for the registration of domain name do not prohibit registrants from having several domain names. Indeed, the Commission pointed out that the complainant himself already owned and used another domain name, namely iter.it.

Concerning the complainant's argument that the Commission had no legitimate right to register the domain name iter.eu, given that ITER was not a company but an organisation, the Commission pointed out that this argument was not legally sound. Article 4(1)(b)(ii) of the Basic Regulation refers to "*organisation[s] established within the Community (...)*" as potential proprietors of domain name. Consequently, the Commission can confirm that an "organisation" can register a domain name under the .eu TLD.

As regards the complainant's point concerning the lack of reasoning of the Commission's response to his requests for information, the Commission explained that its Representation provided the complainant with information concerning the mechanism for



the reservations of domain names for the European institutions and any other rules on management of domain names. The Representation therefore appeared to have responded to his question. The Commission went on to point out that, for any further information, including information on how use the ADR procedure, the complainant could to contact the EURid, which has established a call centre to provide information to the public.

The Commission finally concluded that the information its services had given to the complainant and information that had been made available to the public should be considered as sufficient to deal with most of the questions that an interested user may have and, particularly, with those raised by the complainant.

The complainant's observations

In his observations on the Commission's opinion, the complainant maintained his view that he had a prior right to use the domain name iter.eu.

The complainant asked the Ombudsman to take action so that the EURid or a judicial authority will adopt a binding decision against the Commission.

The Ombudsman's further actions

With a view to providing the complainant with useful advice and in order to ascertain whether there had been any specific developments concerning the iter.eu domain name, the Ombudsman's services contacted the Commission by e-mail on 20 June 2007. As a result of these contacts, the Commission confirmed that, as regards domain names reserved by the Commission, there are four possible scenarios:

- The reserved domain name is registered and used by the Community institution or body concerned; or
- The reserved domain name remains on the reserved list without being registered. It is, therefore, not currently in use. However, it may be registered and used in the future by a Community institution or body; or
- A third party requests the right to use a domain name which is on the reserve list. If the institution or body concerned does not object to the use of the domain name by the third party, the reserved domain name is then registered by the Commission and subsequently licensed to the third party for use by that third party; or
- A domain name is no longer deemed to be of any use to the institution or body concerned and is removed from the reserve list, in which case it can be registered by a third party.

In its reply, the Commission further stated that, at the time of writing, that is 9 July 2007, the Commission had received 36 requests for the release of a domain name, 14 of which had been accepted. In these cases, the relevant domain names were, registered in the name of the Commission and licensed for use by the requesting party (that is, the Commission made use of the third scenario described above).

The possibility described in point 4 above, i.e., that a do main name is no longer deemed to be of any use to the institution or body concerned and is removed from the reserve list, had not been used by the Commission thus far.



Regarding more specifically the domain name *iter.eu*, the Commission pointed out that the complainant had already requested use of this domain name. The complainant's request was, however, rejected on the grounds that this domain name was necessary for the ITER project, of which the EU has been a member since 1988. The reservation of the domain name *iter.eu* ensures, in sum, a suitable presence on the web for the ITER project and reflects the EU's links to this high-profile international organisation. The Commission also pointed out that any future decision as regards registration of the domain name *iter.eu* will be taken by the Commission in consultation with its partners.

The Commission finally explained that, as regards the third scenario described above, when a third party asks for the registration of a reserved name, the Registry contacts the Commission which launches internal consultations with the Directorate-General, or the other institutions that originally reserved the name. In the event of a positive response, the Commission asks the third party to sign a license agreement for use of the name. The name will be thereafter be registered in the name of the Commission, but can be used by the third party subject to the licence agreement.

THE DECISION 1 Preliminary remarks

1.1 Before entering into an analysis of the merits of the present case, the European Ombudsman considers it useful to make the following preliminary remarks.

1.2 The Ombudsman's inquiry into the present complaint concerns an allegation of failure to reply and a claim to receive a reasoned reply. As regards the complainant's claim, the Ombudsman notes that the complainant questions the *application* of Regulation No 874/2004 of 28 April 2004 (8) and in particular, whether the reservation of the domain name *iter.eu* by the Commission was in accordance with the applicable rules. In examining the complainant's claim (Part 3 of the present decision), the Ombudsman therefore considers it appropriate to examine whether the Commission has provided a sufficient explanation as regards its compliance with both the substantive and the procedural requirements concerning the reservation of the domain name in question.

1.3 The Ombudsman also notes that, in his e-mail of 21 February 2006 to the Commission, the complainant asked to know how he could "complain about the existing legislation". The Ombudsman points out that he has consistently taken the view that a challenge to the *merits* of Community legislation does not raise an issue of possible maladministration. The present inquiry does not, therefore concern, the merits of Regulation No 874/2004.

1.4 In his observations, the complainant requested that the Ombudsman take action to ensure that EURid or a judicial authority adopts a binding decision against the Commission.

The Ombudsman points out that, if he finds maladministration, the actions he may take are laid down by the EC Treaty and the Statute of the Ombudsman and that he has no power to intervene in the proceedings of EURid or of judicial authorities.

2 The alleged failure to reply by the Commission

2.1 On 21 February 2006, the complainant wrote to the Director of the Commission's



Representation in Rome ("the Representation") to ask how he could complain against the existing legislation concerning the implementation and functions of the .eu Top Level Domain ("TLD") and the principles governing registration. He considered that since he had already registered the trademark "iter" in 1989 he had a better right than the Commission to obtain the domain name iter.eu. In his complaint to the Ombudsman, the complainant alleged that he had received no reply from the Commission, despite a reminder sent to the institution in March 2006.

2.2 In its opinion, the Commission explained that Mrs B replied to the complainant on behalf of the Director of the Representation. She informed the complainant of the existence of an ADR procedure, foreseen by Article 22 of the Commission Regulation No 874/2004 of 28 April 2004, which lays down public policy rules concerning the implementation and functions of the .eu Top Level Domain and specifies the principles governing registration (9) ("Regulation 874/2004"). Mrs B. went on to point out that this ADR could be initiated against, *inter alia*, decisions taken by the EURid.

However, it appeared that the complainant did not receive the relevant message. On 6 March 2006 the complainant therefore sent a reminder to the Director of the Representation. On 4 April 2006, the Director forwarded to the complainant the message from Mrs B. that he had apparently not received.

2.3 In accordance with Section 4 (Dealing with Enquiries) of the Commission's Code of Good Administrative Behaviour (10), "*[a] reply to a letter addressed to the Commission shall be sent within 15 working days from the date of receipt of the letter (...)*".

In the present case, it appears that the Commission only replied to the complainant's message of 6 March 2006 on 4 April 2006. Therefore, it did not comply with its own rules as regards replying to letters addressed to the Commission. Furthermore, the Ombudsman notes that the Commission did not give reasons for its failure to reply to the complainant's message of 6 March 2006 within the period of 15 working days.

Nevertheless, and even though the Ombudsman takes the view that such failures may constitute instances of maladministration, the Ombudsman also considers that the Commission finally replied to the complainant's relevant message and that the latter, in his observations, did not pursue his allegation further.

2.4 In light of the above, the Ombudsman does not consider it necessary to pursue his inquiry into this aspect of the case or to make a formal critical remark to the Commission in this regard.

3 The complainant's claims

3.1 In his complaint to the Ombudsman, the complainant claimed that the Commission should provide him with a reasoned reply to the issue that he had raised, that is, to know the reasons why the Commission was entitled to own the iter.eu domain name and also to receive information on the purpose of Regulation 874/2004.



3.2 Principles of good administration require that the institution should deal with citizens' requests properly and provide them with the information they have requested. In light of the above-outlined principles, the Ombudsman will examine whether the response of the Commission was adequate.

3.3 The Ombudsman notes that the applicable Community legislation establishes a hierarchy as regards the right to reserve and register domain names. In accordance with this hierarchy, the Commission has a prior right to reserve domain names in view of their possible future registration by Community institutions and bodies.

As noted in point 1.3 above, the Ombudsman is not competent to review the merits of legislation, and thus cannot call into question the existence of the above-mentioned prior right. The Ombudsman is, however, competent to review whether the Commission has complied fully with the above-mentioned legislation.

3.4 Article 9 of Regulation 874/2004 establishes that the Commission may ask EURid to introduce domain names directly under the .eu TLD " *for use by the Community institutions and bodies* ". The Commission's right to reserve a domain name would appear only be subject to one substantive condition, which is that the domain name is "for use" by the Community institutions and bodies.

The Ombudsman is of the view that the above-outlined condition relates to any present use, or to any future use which can be reasonably envisaged.

The Commission has pointed out that the domain name *iter.eu* was necessary for the ITER project, of which the EU has been a member since 1988. It stated that the reservation of the domain name *iter.eu* ensures a suitable presence on the web for the ITER project and reflects the EU's links to this high-profile international organisation.

3.5 The Ombudsman takes the view that the Commission has provided a detailed explanation as regards the reasons why it reserved the *iter.eu* domain name. The Ombudsman considers, in sum, that it is reasonable and appropriate that organisations and programs which have links to Community institution and bodies, as is the case with ITER, are also present on the .eu TLD. Thus, the substantive condition concerning "use", as outlined above, appears to have been met.

3.6 Article 9 of Regulation 874/2004 also establishes that " *after the entry into force of this Regulation and not later than a week before the beginning of the phased registration period provided for in Chapter IV, the Commission shall notify the Registry of the names that are to be reserved and the bodies that represent the Community institutions and bodies in registering the names.* " Thus, the Commission's right to reserve a domain name is also subject to a procedural condition.

3.7 In this regards, t he Ombudsman notes that it emerged, from his inquiries into the present complaint, that the Commission submitted its request for registration of the



domain name iter.eu on 17 November 2005 (11) . The phased registration period started on 7 December 2005. Thus, the procedural condition, as outlined above, appears to have been met.

3.8 In light of the above, the Ombudsman is of the view that the Commission has provided the complainant with a sufficient explanation as regards how it had complied with both the substantive and the procedural requirements relating to the reservation of the domain name in question.

Additional arguments of the complainant

3.9 The complainant's argued that, since the Commission already used the domain name iter.org, it had no legitimate right to use the domain name iter.eu. The Commission, in response, emphasised that there is no rule which prohibits registrants from using several domain names. The Ombudsman considers that the Commission's position appears to be in accordance with the applicable legislation.

3.10 The complainant also argued that Commission has no legitimate right to use the domain name iter.eu, given that ITER was an "organisation" rather than a "company". The Commission points out that Article 4(1)(b)(ii) of the Basic Regulation refers to "*organisation[s] established within the Community (...)*." Thus, organisations are potential proprietors of domain names. The Ombudsman considers that the Commission's position appears to be in accordance with the applicable legislation.

3.11 In light of the above, the Ombudsman takes the view that the Commission's provided an adequate response to the complainant's requests and that no further inquiries are therefore needed as regards the complainant's claim.

4 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears that there are no grounds for further inquiries into this case. The Ombudsman therefore closes the case.

The President of the Commission will be also informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) According to the information available on the www.iter.it website, ITER is the acronym for Innovation, Technologies, Experience and Research. Since 1989 it has been a B2B Atelier, which develops customised services for public bodies and private corporations, organises events on digital office topics and biotechnology, and publishes specialised magazines.

(2) A top-level domain (TLD) is the last part of an Internet domain name; that is, the letters



which follow the final dot of any Internet domain name. For example, .eu is the top-level domain in the Internet domain name www.example.eu.

(3) OJ 2004 L 162, p. 40.

(4) OJ 2002 L 113, p. 1.

(5) The approval of new TLDs is coordinated, on a global basis, by the non-profit corporation Internet Corporation for Assigned Name and Numbers ("ICANN"). The board of ICANN approved the .eu TLD on 21 March 2005 and authorised the managing director of ICANN to enter into an agreement with the entity chosen by the European Union to operate the .eu TLD. EUR id was chosen by the European Union to operate the .eu TLD.

(6) In accordance with Article 3 of the Basic Regulation, the .eu TLD will be operated by the Registry. The entity chosen by the European Union to act as the Registry was EUR id. EUR id is thus responsible for the organisation, administration and management of the .eu TLD and for, inter alia, the dissemination of information to stakeholders. EUR id is a not-for-profit organisation, established in Belgium, and has been selected by the European Commission to operate the new .eu top level domain.

(7) The Ombudsman notes that the Commission did not mention the date on which the relevant response was provided to the complainant.

(8) OJ 2004 L 162, p. 40.

(9) OJ 2004 L 162, p. 40.

(10) OJ 2000 L 308, p. 32.

(11) This information was confirmed in a message sent on 1 August 2007 to the Ombudsman's legal service by Mr S., Legal Manager of EURid, in reply to the request submitted on the same date by the Ombudsman's service.