



THE BELGIAN CENTRE FOR ARBITRATION AND MEDIATION

**DECISION OF THE THIRD-PARTY DECIDERS
(APPEAL COMMITTEE)**

COMUTO s.a. / FLIXMOBILITY GmbH

Case no. 44471: blablabus.be

1. The Parties

1.1. Complainant:

COMUTO s.a.

with registered offices at Avenue de la République 84, 75011 Paris,
France

hereinafter referred to as "**the Complainant**" or "**the Respondent in Appeal**"

Represented by:

Axel DOUCERAIN, trademark attorney at ATLANTIP, Rue Edith Piaf 4,
Immeuble Asturia Bât C, 44800 Saint-Herblain, France

1.2. Domain name holder:

FLIXMOBILITY GmbH (formerly FLIXBUS GmbH)

with registered offices at Birketweg 33, 80369 München, Germany

hereinafter referred to as "**the Domain name holder**"

Represented by:

Dr. Hannah ECKERMANN, attorney at law at Kroher Strobel
Rechtsund Patentanwälte PartmbB, Bavariaring 20, 80336 Munich,
Germany

2. Domain name

Domain name: **BLABLABUS.BE**

Registered on: 13 May 2015

Hereafter referred to as "**the Domain name**".

3. Procedure

On 7 June 2019, the Complainant filed a complaint with the Belgian Centre for Arbitration and Mediation (hereafter referred to as the "CEPANI") under article 10 of the general terms and conditions of the domain name registration within the ".be" domain governed by DNS BE (hereafter referred to as "the Policy") and in accordance with the CEPANI Rules for domain name dispute resolution (hereafter referred to as "the Rules").

In accordance with Article 7.2. of the Rules, Mr. Fernand de Visscher was appointed by the CEPANI as the Third-Party Decider to settle the dispute.

On 30 July 2019, the Third-Party Decider noted the regularity of the procedure and took the decision under appeal, by which he declared the complaint well-founded and ordered the transfer of the Domain name.

On 14 August 2019, the Domain name holder filed a request for appeal. The Complainant replied on 2 September 2019.

On 9 September 2019, the Domain name holder answered to the Complainant's response of 2 September 2019, which was communicated to him.

Pursuant to the Article 18.6. of the Rules, the Appeal Committee was appointed by the CEPANI on 9 September 2019, the members of the Committee having all signed a declaration of independence.

On 16 September 2019, pursuant to Article 13 of the Rules, the deliberations were closed.

4. Factual Background Information

4.1. The Complainant is operating a worldwide online marketplace for carpooling, since 2006 under the trademark BLABLACAR. Its website and mobile apps connect drivers and passengers willing to travel together between cities and share the cost of the journey.

At the end of 2018, the Complainant decided to expand its activities and purchased from SNCF, the long-distance coach operator "Ouibus". By this new acquisition, the Complainant intends to operate bus lines in various countries such as Germany, Belgium and the Netherlands, under the denomination BLABLABUS.

4.2. While the Domain name holder and the Complainant are currently active in the same market (passenger transport), the Domain name holder nevertheless sets out that, at the time of registration of the subject domain name in 2015, the services offered by either Party (namely operating an online marketplace for carpooling as opposed to coach services) were significantly different, and therefore the Parties were by no means direct competitors.

5. Position of the parties

5.1. Position of the Complainant

The Complainant asserts that all the conditions of Article 10.b.1. of the Policy are fulfilled since:

- the Domain name is confusingly similar to trademarks and trade names in which the Complainant has rights;
- the Domain name holder has no rights or legitimate interests in the Domain name; and
- the Domain name was registered or is being used in bad faith.

Consequently, the Complainant requests the transfer of the Domain name BLABLABUS.be to the complainant.

5.2. Position of the Domain name holder

The Domain name holder asserts that the conditions of Article 10.b.1. of the Policy are not fulfilled since:

- the Domain name is not identical or confusingly similar to any relevant earlier rights of the Complainant;
- the Complainant has failed to demonstrate that there are serious grounds to consider that the contested Domain name holder does not have rights or legitimate in the Domain name; and
- the Complainant has failed to prove that the Domain name has been registered or is being used in bad faith.

Consequently, the Domain name holder requests that the decision in domain name case No. 44471 of 30 July 2019, be annulled and that the claim to transfer the Domain name BLABLABUS.be to the Complainant be dismissed.

6. Discussion and findings

Pursuant to Article 16.1 of the *CEPANI rules for domain name dispute resolution*, the Third-Party Decider shall rule on domain name disputes with due regard for the Policy and the CEPANI rules for domain name dispute resolution.

Pursuant to Article 10, b), 1) of the Terms and conditions of the domain name registration within the ".be" domain governed by DNS BE, the Complainant must provide evidence of the following:

- (i) "the Domain name holder's domain name is identical or confusingly similar to a trademark, a tradename, a social name or corporation name, a geographical designation, a name of origin, a designation of source, a personal name or name of a geographical entity in which the Complainant has rights; and
- (ii) the Domain name holder has no rights or legitimate interests in the domain name; and
- (iii) the Domain name holder's domain name has been registered or is being used in bad faith."

6.1. Identical or confusingly similar to

6.1.1. The rights invoked by the Complainant

The Complainant relies on the following portfolio of **trademarks** covering *i.a.* transportation services in class 39:

Trademark number	Date of filing	Trade mark
EU 10 812 485	17/04/2012	BLABLACAR
EU 10 813 236	17/04/2012	
EU 13 431 895	04/11/2014	BLABLA
EU 13 434 378	05/11/2014	
IR 1 305 968 designating <i>i.a.</i> the EU	22/04/2016	BLABLACAR
EU 17 311 622	11/10/2017	BLABLALINES
IR 1 398 437	04/12/2017	BLABLASURE
IR 1491060	04/06/2019	BLABLA
IR 1491036	04/06/2019	BLABLABUS

The Complainant also relies on a variety of **domain names** which correspond exactly or are similar to the Domain name:

Domain name	Registration date
Blabla.com	01/04/2002
Blablacar.com	31/08/2010
Blablacar.fr	16/09/2010
Blablacar.co.uk	16/09/2010
Blablacar.be	16/09/2010
Blablacar.nl	16/09/2010
Blablacar.lu	16/05/2011
Blablabus.com	17/06/2012
Blablabus.fr	15/12/2014

Finally, the Complainant considers that it is also known under the **trade names** BLABLA, BLABLACAR and BLABLABUS.

6.1.2. Which of these rights can be invoked by the Complainant?

The Appeal Committee will first determine which of these rights can validly be invoked by the Complainant.

(i) Domain names

A domain name can be used to identify a business on the Internet and should be considered as the digital expression of a trade name. Accordingly, a domain name is deemed equal to a trade name in the meaning of the Policy, when the website contains information regarding the business and its goods or services (see CEPANI, case nr. 44252, "airco.be").

In the case at hand, it appears that the domain names blablabus.com and blablabus.fr are used to advertise the Complainant's services.

As a consequence, the Complainant can validly invoke its BLABLABUS domain and trade names, which are identical to the Domain name.

(ii) Trademarks filed after the registration of the Domain name

The Appeal Committee also notes that CEPANI case law sometimes takes into account subsequent trademarks, based on the argument that article 10, b), 1), (i) of the Policy, does not require that the trademark invoked by the Complainant was filed/registered prior to the registration of the Domain name (see CEPANI, case nr. 44323, "muckboots.be"; case nr. CEPANI, 44260, "sputnik.be"; CEPANI, case nr. 44469, "myaxa.be").

To support such reasoning, reference can be made to Regulation 874/2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration. Article 10(1) of said Regulation confers rights on holders of "prior rights". Such requirement of a "prior right" is absent from Section 10, b), 1), (i) of the Policy, which means that no such requirement exists under the Policy.

There is no reason to interpret restrictively the conditions set out in section 10, b), 1), (i) of the Policy, because the interests of the Domain name holder are sufficiently protected by the second and third conditions laid down by the Policy, which must be read and interpreted as a whole (see CEPANI, case nr. 44472, "*leboncoin.be*"; CEPANI, case nr. 44260, "*sputnik.be*"). Indeed, if the Domain name holder had an existing right to oppose the registration of the trademark invoked by the Complainant or a right that would restrict the exclusive right of the Complainant (e. g. an earlier trade name), then it would have a legitimate right or interest in the Domain name and the transfer of the Domain name could therefore not be ordered. But if the Domain name holder does not have such right, there is no reason to restrict the protection granted to the Complainant's trademark.

As a consequence, the Appeal Committee is of the opinion that all the trademarks invoked by the Complainant can be taken into account, including those registered after the Domain name. The Appeal Committee will consider all the trademark rights invoked by the Complainant, including the BLABLABUS trademarks registered after the registration of the Domain name.

6.1.3. *Comparison of the signs*

Since the Complainant can validly invoke its BLABLABUS trademarks and domain names, it is sufficient for the Appeal Committee to note that the Domain name is identical to these signs.

Accordingly, there is no need for the Appeal Committee to address the question of the similarity between the signs 'blablabus' and 'blablacar', nor to compare the sign 'blablabus' with the semi-figurative marks invoked by the Complainant.

In any event and even if such comparison is not required for the above-mentioned arguments, the Appeal Committee could not share the Domain name holder's view that the signs in dispute (i.e. earlier Complainant's signs vs. Domain name) would be dissimilar:

- the common initial element 'blabla' cannot be considered as merely descriptive, so that the difference between the final elements 'bus' and 'car' would suffice to dispel any likelihood of confusion.

On the contrary, it is the elements "bus" or "car" that refers to a characteristic of the provided services, namely the transport of persons by means of these vehicles. The Domain name holder does not provide any evidence that the expression 'blabla' would be descriptive of such transportation services.

- furthermore, the fact that the expression 'blabla' could be used to refer to the more or less talkative nature of a driver refers to a particular marketing concept. However, when assessing the distinctiveness of a sign, account cannot be taken of a particular marketing concept. Indeed, since a marketing concept is purely a matter of choice for the undertaking concerned, it may change after a sign has been registered and it cannot therefore have any bearing on the assessment of the distinctive character of the mark (GC, 5 May 2009, Thomas Rotter/OHIM, T-449/07, paragraphs 34-35; GC, 10 October 2007, Bang & Olufsen/OHIM, T-460/05, paragraph 31 and GC, 21 October 2008, Jean Cassegrain/OHIM, T-73/06, paragraph 33).

6.1.4. Conclusion

Considering the above, the Appeal Committee notes that the Domain name is identical or at least confusingly similar to the BLABLABUS trademark and trade name of the Complainant. The first condition is therefore met.

6.2. Right or legitimate interests

6.2.1. According to article 10, b, 1, (ii) of the Policy, within the scope of the alternative dispute resolution proceedings, the Complainant has, among others, to assert and to prove, in compliance with the rules of procedure, that the registrant has no rights or legitimate interests in the Domain name.

6.2.2. The Domain name holder can rely on several circumstances to demonstrate his rights or legitimate interests on the Domain name, such as:

- the use by the registrant of the Domain name or a name corresponding to the Domain name in connection with a *bona fide* offering of goods or services (or the demonstration of a preparation for such use) prior to any notice of the dispute;
- the fact that the Domain name holder has been commonly known by the Domain name, whether through its trademark or even without a trademark.

6.2.3. In the present case, it appears that the Domain name holder does not hold any trademark or other right consisting in whole or in part in the sign "BLABLABUS" or even "BLABLA", with the exception of the trademark application BLABLABUS no. 4529571 filed by the Domain name holder "without prior consultation with the legal department" and which was withdrawn on 7 March 2019 (see Appendix 7 of the Complainant's file).

6.2.4. The Domain name holder recognised the lack of use and of any intent to use neither the trademark "Blablabus" nor – *a fortiori* – the disputed Domain name in

connection with the offering of goods and services : " *Par ailleurs, nous vous confirmons que, depuis la demande de dépôt et jusqu'au retrait total effectif de la marque, aucun usage de la marque BLABLABUS n'a été fait ou ne sera fait* " (see Appendix 7 of the Complainant's file).

The Domain name holder even confirmed he requested the withdrawal of the trademark application BLABLABUS no. 4529571 filed on 28 February 2019.

6.2.5. Furthermore, the Domain name holder has not been granted, assigned, licensed or transferred any kind of rights relating to the Complainant's trademarks, domain names or trade name on BLABLABUS.

6.2.6. Finally, given the absence of use, by the Domain name holder, of the disputed sign in connection with a *bona fide* offering of goods and services, and the fact that the name BLABLABUS is not a common name in connection with transport services (with the exception of the marketing concept developed by the Complainant), it appears that the Domain name was purchased by the Domain name holder for the sole purpose of creating confusion with its competitor's activities, or to try to take advantage of the latter's reputation (see e.g. CEPANI, case nr. 44461, "*axabankplc.be*"). .

6.2.7. The Appeal Committee finally notes that the Domain name holder did not put forward any convincing circumstances or arguments which may indicate the existence of a legitimate rights or interests in the Domain name (see CEPANI, case nr. 44466, "*jechoisismonavocat.be*"; CEPANI, case nr. 44460, "*isabellegrippa.be*" ; CEPANI, case nr. 44444, "*basfantwerpen.be*").

6.2.8. Based on the above, the Appeal Committee considers that the Domain name holder has no rights or legitimate interests in the Domain name. The second condition of the Policy is therefore also met.

6.3. Registration or use in bad faith

6.3.1. According to Article 10, b), 1) of the Policy, the Complainant must demonstrate that the Domain name holder's Domain name has been registered or is being used in bad faith.

6.3.2. The registration or use of the Domain name in bad faith are alternative conditions (see CEPANI, case nr. 44208, "*lookhatme.be*").

6.3.3. Bad faith may not be presumed but must be reasonably proven by the Complainant (see CEPANI, case nr. 44387, "*eiffage-benelux.be*").

Bad faith is a legal fact that can be demonstrated by any legal means, including presumptions and circumstances that indicate, with a reasonable degree of certainty, that the Domain name holder knew, or should have known, the Complainant's trade

name and trademark and nevertheless registered the Domain name (see CEPANI, case no. 44150, «*produo.be*»), as referred to by B. DOCQUIR et O. DE PRELLE, «*L'enregistrement abusif des noms de domaine : aperçu de la jurisprudence des Tiers-décideurs du CEPANI*», in X. *Les noms de domaine.be 10 ans d'existence du règlement pour la résolution des litiges en la matière*, Bruxelles, Bruylant, 2013, p. 53 and CEPANI, case nr. 44387, "*eiffage-benelux.be*").

The Article 10, b), 2) of the Policy mentions several circumstances to prove that the Domain name has been registered in bad faith. The list contained in this article is merely illustrative and not exhaustive (see CEPANI, case no. 44125, "*mariott.be*").

6.3.4. In the Appél Committee's view there is sufficient evidence that the registration of the Domain name was made in bad faith, since:

- the Domain name holder knew, or should have known, the existence of the activities of the Complainant as its prior rights on BLABLA, BLABLACAR and derivatives. Indeed, both Parties are (and already were at the time of registration) direct competitors (in the sector of transportation). In contradiction with the Domain name holder's assertions, in the transport sector, carpooling is, *in fine*, in competition with the coach services and conversely. The two services (carpooling and bus transportation) aims at meeting the same needs: travelling from one place to another without using passenger's own vehicle. Passengers can decide to travel either by bus, or through carpooling services.

Therefore, it is not convincing to argue that "blabla" sign would be used by Domain name holder without reference to the Complainant's competing services.

- the Domain name holder's conduct with respect to the Domain name may be qualified as passive holding since the Domain name had never been used in relation with the offering of goods or services. Although CEPANI case law shows diverging opinions on this issue, the mere passive holding of a domain name can be sufficient to establish bad faith (see e.g. CEPANI, case nr. 44233, "*piperheidsieck.be*"). In present case, the well-known character and significant reputation of the Complainant's trademark in numerous Member States of the European Union, including in Belgium, (at least in the transportation sector) strengthens the weight of passive holding as an evidence of bad faith of the Domain name holder at the time of registration (see CEPANI, case nr. 44383, "*Instagram.be*") or at least at the time of such passive use.
- through certain behaviours (such as the use of AdWords and use of "http" address such as www.flixbus.fr/BLA-BLA/BUS), it seems confirmed that the Domain name holder tries to mislead the end users on the origin of the services, or at least to unduly benefit from the Complainant's goodwill and reputation.

6.3.5. Finally, considering that bad faith can also be proved on the basis of simple presumption (see 6.3.3.) and in the light of the above developments, it leaves little doubt as to the intention of the Domain name holder to disturb the business of the

Complainant, who is active in the same sector (i.e. the sector of transportation), by registering the disputed Domain name.

6.3.6. As a result, the Appeal Committee considers that the registration and/ or use of the Domain name are made in bad faith.

The third condition of the Article 10, b), 1) of the Policy is therefore met.

7. Decision

For the reasons described above and pursuant to Article 10, e) of the Terms and conditions of the domain name registration within the ".be" domain governed by DNS BE,

the Appeal Committee, composed of three undersigned Third-Party Deciders, hereby:

- rules that the appeal is unfounded; and
- consequently, confirms the order to transfer the Domain name "BLABLABUS.be" from the contested Domain name holder to the Complainant.

Namur, 9 October 2019.



Alexandre CRUQUENAIRE
Third-party Decider



Pierre-Yves THOUMSIN
Third-party Decider



Florence MARGENAT
Third-party Decider