

DECISION OF THE THIRD-PARTY DECIDER

WIKIPOWER S.P.R.L. / WLOUDENS

Case no. 444108 / compareurenergie.be

1. The Parties

1.1. Complainant: WIKIPOWER S.P.R.L., established in Belgium, rue Natalis 2, 4020 Liège
Represented by: Mr. Alexandru LAZAR, attorney, with offices located in Belgium, Place de Bronckart, 1, 4000 Liège

1.2. Domain name holder: WLOUDENS, undertaking under Dutch law, established in the Netherlands, Hoofdweg 401-3, 1056CS Amsterdam
Represented by: Mr. Sedymar Wouden, founder

2. Domain name

Domain Name: **compareurenergie.be**

Registered on: 10 June 2014

Hereafter referred to as the "Domain Name".

3. Procedure

1. On 23 December 2020, Complainant filed a complaint and 9 exhibits (hereafter the "**Complaint**") to the Belgian Centre for Arbitration and Mediation (hereafter "**Cepani**") concerning the Domain Name.

The Domain name holder submitted a response on 24 January 2021.

Cepani notified the Parties of the appointment of the Third-Party Decider on 25 January 2021 and they were informed that the debates would be closed on 1 February 2021, and that a decision was due on 15 February 2021.

By its letter of 28 January 2021, Complainant requested (i) to continue the proceedings in English and (ii) to be granted permission to retort to the Domain name holder's response.

Both requests were granted by virtue of art. 12.1 Cepani's Rules for domain name disputes resolution (hereafter "**Rules**") and art. 13 of the Rules. Cepani informed the Parties of the same on 1 February 2021.

On the 11 February 2020, Complainant submitted its retort and 5 additional exhibits (hereafter: the "**Retort**").

4. Factual Background information

2. Complainant is a Belgian company active in the energy sector. Since October 2012 it offers an online service consisting of the price comparison of energy services, to French-speaking consumers in Belgium (Exhibits 5 and 6 of Complainant's Complaint). Its online price comparison service is accredited by the energy regulator CREG.

Complainant offers its services through its the domain name '**comparateur-energie.be**', registered on 26 March 2012 (Exhibit 1 of Complainant's Complaint).

3. The Domain name holder is a Dutch company that offers competing services of price comparison of energy services on the Flemish energy market since 2014.

According to the Domain name holder, it acquired the domain name '**comparateurenergie.be**' on 18 December 2017. The Domain Name had previously been registered by the initial holder on 10 June 2014. The Domain name holder uses the Domain Name to provide these services to the French-speaking part of Belgium since August 2018.

5. Position of the parties

5.1. Position of the Complainant

Complainant **requests the transfer** of the Domain Name. Its arguments can be summarised as follows:

- Complainant holds that it has a prior right that would justify an immediate cessation of the use of the Domain Name. It refers to the registration date of its domain name 'comparateur-energie.be' on 26 March 2012. The Domain Name was registered by the initial domain name holder on 10 June 2014.
- Complainant alleges that, although the words 'energie' and 'comparateur' in its domain name 'comparateur-energie.be' may be generic terms, the combination of both terms is distinctive, especially in relation to the services of high quality offered by Complainant.
- Complainant alleges that the similarity of the services, targeting the same public under similar domain names, creates confusion among consumers.

- Complainant refers to the identical meta-data describing its website and the website of the Domain name holder, which allegedly proves “plagiarism” by the Domain name holder.
- Complainant states that Internet users using the keywords “energy comparator” on Google could be misled between the Domain Name and Complainant’s domain name.
- Complainant alleges that the Domain name holder intended to benefit from Complainant’s advertising and marketing efforts and investments made. It claims that its services are of superior quality to the Domain name holder’s.

5.2. Position of the Domain Name holder

The Domain name holder disputes that the three conditions of article 10(b)(1) of the DNS BE Terms and Conditions are fulfilled. It requests that the Complaint be dismissed, based on the following:

- Identical or similar domain name: the Domain name holder acknowledges a likelihood of confusion, but it emphasises the generic nature of the keywords ‘comparateur’ and ‘energie’ and that they are not protected under a registered trademark.
- Rights and interests: the Domain name holder states that the Domain Name describes its services, *i.e.* energy comparison services. It notes that investments in advertising have been made to maintain the customer base, in the website and in the French language functionalities.
- Absence of bad faith registration or use. the Domain name holder asserts that it acquired the Domain Name on 18 December 2017, which had previously been registered by the initial holder on 10 June 2014.

The Domain Name was available for registration until 10 June 2014. Complainant had the opportunity to register the Domain Name for over 2 years (*i.e.* the period between the registration of its own domain name and the registration of the Domain Name).

Furthermore, the Domain name holder is active on the Flemish energy market since 2014 under the domain name ‘energieleverancier.be’ and that it always intended to extend its services to the French-speaking part of Belgium.

- the Domain name holder offers to transfer of the Domain Name to Complainant for the sum of 30.000 EUR.

6. Discussion and findings

4. 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 10b (1) of the Terms and conditions of domain name registrations under the ".be" domain operated by DNS BE (hereafter "DNS BE Terms and Conditions"), the Complainant must provide evidence of the following:

- "the Domain Name holder 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
- the Domain Name holder has no rights or legitimate interests in the domain name; and
- the Domain Name holder's domain name has been registered or is being used in bad faith."

5. The Complainant has the burden of proving that these cumulative conditions are met. Only if such proof is provided can the compulsory transfer of a domain name be imposed.

The order to transfer a domain name is a restriction on a domain name holder's right to the domain name and must remain an exceptional measure, which should be applied with due caution (decision No. 44393 dated 8 April 2016, 'fegarbel.be'). It should be reminded that the freedom to conduct a business warrants the right of undertakings to exercise economic activities of their choice (including the offering of identical or similar services to competing undertakings in the same market), having regard to international, European and national legislation (art. 16 Charter of Fundamental rights of the European Union, art. 11.3-4 Code of Economic Law).

6.1. The Domain Name is identical or confusingly similar to a sign in which the Complainant has rights

6. Complainant must prove that the Domain Name is identical or confusingly similar to a prior right it holds.

The rights to a sign that can be taken into consideration in the context of a domain name dispute are listed, in a limitative way, in article 10(b)(1)(i) of the DNS BE Terms and Conditions: a trademark, a trade name, a registered name or a company name, a geographical designation, a name of origin, a designation of source, a personal name or name of a geographical entity.

7. It is established that the Domain Name 'comparateurenergie.be' and the domain name of Complainant 'comparateur-energie.be' are identical or confusingly similar.

However, Complainant does not demonstrate that it holds any of the eligible rights to the sign “comparateur-energie” or “comparateur-energie.be”, which are listed in an exhaustive way in art. 10(b)(1)(i) of the DNS BE Terms and Conditions.

Contrary to what Complainant holds, it is not sufficient to demonstrate that ‘comparateur-energie.be’ was registered prior to the Domain Name, in order to establish the existence of a protected earlier right that can justify the transfer of the Domain Name (decision No. 44393 dated 8 April 2016, ‘fegarbel.be’). The registration of a domain name as *such* does not confer any exclusive right that warrants the transfer of the Domain Name.

It is observed that the terms “comparateur” and “energie” are generic, descriptive terms for the type of services offered by both Complainant and the Domain name holder. It is not sufficient for Complainant to state that the combination of both generic terms results in a “distinctive” name, without proof that the same is protected under a trade mark, as a trade name or any other sign that could be protected – provided that all legal conditions are met – under national or international law, as required by article 10(b)(1)(i) of the DNS BE Terms and Conditions.

Complainant fails to meet the burden of proof of a prior right to a sign, name or other indication as listed in article 10(b)(1)(i) of the DNS BE Terms and Conditions.

Hence, in the light of the above, the Third-Party Decider finds that the **first condition is not met**.

This finding is sufficient to dismiss the Complaint, considering that the conditions of article 10(b)(1) of the DNS BE Terms and Conditions have to be met cumulatively. The assessment of the second and third conditions may however be useful for the parties to consider.

6.2. The Domain Name holder has no right or legitimate interests in the Domain Name

8. Complainant has the burden to prove the absence of rights or legitimate interests of the Domain name holder in the Domain Name. Complainant cannot be expected to bring evidence of a negative fact but they should demonstrate that, considering the circumstances of the case, serious reasons exist for considering that the Domain name holder has no rights or legitimate interests in the Domain Name (decision No. 44082 dated 23 May 2006, ‘touringassurance.be’).

Inversely, the domain name holder can demonstrate their right or legitimate interests in the domain name in circumstances, such as the ones set out in article 10(b)(3) DNS BE Terms and Conditions. This is not an exhaustive list.

9. the Domain name holder offers *a priori* legitimate services on the Belgian market, *i.e.* online access to price comparisons of the energy service offerings in Belgium.

The Domain Name is of a descriptive nature: it consists of a combination of "comparateur" and "energie", which accurately describes the services offered by the Domain name holder. Furthermore, the offering of competing services is as such not prohibited and neither is the offering of competing services under a generic name that merely describes the nature or the quality of the services. Its interest in using the Domain Name is legitimate.

The use of the Domain Name by the Domain name holder does not prevent Complainant from exercising its activities under its own domain name.

Complainant does not offer any evidence of the contrary: it does not establish that the Domain name holder lacks any right or legitimate interest in the use of the Domain Name. It is admitted that Complainant is affected by the use of the Domain Name by the Domain name holder, a competitor of Complainant, but such impact does not *per se* amount to an absence of right or legitimate interest for the Domain name holder.

Consequently, it is **not demonstrated that the second condition is fulfilled.**

6.3. The Domain Name holder's Domain Name has been registered or is being used in bad faith

10. Complainant must establish that the was registered or is used in bad faith.

Such bad faith registration can be demonstrated *inter alia* in the circumstances described in article 10(b)(2) DNS BE Terms and Conditions. This is not an exhaustive list.

11. Complainant has not demonstrated that the Domain name holder uses the Domain Name in bad faith. It claims that the use of the is contrary to the fair market practices but it does not provide any evidence of this allegation.

The mere circumstance that both undertakings offer competing services, under similar – generic – domain names, does not as such establish any bad faith use of the Domain Name. Complainant claims but does not demonstrate that consumers are misled or confused by the co-existence of two services accessible via similar domain names.

The copying of the meta-description of the Complainant's website in the meta-description of the website accessible via the could be considered an indication of bad faith, but it is undisputed that the Domain name holder has ceased the use of the meta-description of Complainant's website following the formal notice of Complainant (Exhibits 5, 6 of the Complaint).

Complainant has offered no other indications of the Domain name holder's alleged bad faith.

Consequently, it is **not demonstrated that the third condition is met.**

12. It is recalled that the extra-judicial ('alternative') procedure for the resolution of disputes concerning domain names is exceptional in nature and that the Third-Party

Decider's competence is confined to the assessment of the three conditions of article 10(b)(1) of the DNS BE Terms and Conditions.

The decision is without prejudice to the right of the parties to bring proceedings before the courts (decision No. 44390 dated 16 November 2015, 'institut-eve.be', 'eve-institut.be').

7. Decision

Consequently, pursuant to Article 10(e) of the *Terms and conditions of domain name registrations under the ".be" domain operated by DNS BE*, the Third-Party Decider denies that the domain name "**compareurenergie.be**" has to be transferred to the Complainant.

Brussels, 1 March 2021



Sari DEPREEUW
Third-Party Decider