

World Trademark Review *Daily*

Alternative dispute resolution procedures for '.fr' suspended
France - Hogan Lovells

Domain names

May 18 2011

On March 22 2011 the French Parliament adopted a new act (the Act implementing various provisions for the adaptation of French legislation to EU legislation in the fields of health, employment and electronic communications) which substantially modified the provisions regarding the allocation and management of domain names under the '.fr' extension.

This modification of legislation follows the ruling of the French Constitutional Court of October 6 2010 in which it was held that Article L45 of the Posts and Electronic Communications Code, as well as the corresponding statutory instrument (Articles R20-45-34 ff of the code), were unconstitutional.

By delegating the power to define the rules relating to the allocation and management of domain names under '.fr' to the executive power, the Parliament had denied its own competence since these provisions affect the freedoms of communication and entrepreneurship, which are the exclusive competence of the legislator according to the French Constitution.

In order to avoid legal uncertainty, however, the Constitutional Court ruled that the "unconstitutional rules" would remain applicable (and prior acts would not be invalidated) until July 1 2011 at the latest, therefore giving the French legislator over eight months to amend existing legislation (for further details please see ["Rules applicable to '.fr' domain names found to be unconstitutional"](#)).

The required modifications to the '.fr' legislation were made by the Act of March 22 2011, which amended Article L45 and created articles L45-1 to L45-8. To comply with the requirements of the decision of the court, the act provides that these new provisions will enter into force on June 30 2011.

While some of the new provisions of the code merely pass into law former regulatory provisions, a number of them have substantially amended the rules relating to the allocation of domain names.

The first notable point relates to the wider eligibility conditions for registration of '.fr' domain names. The code, in its new Article L45-3, now expressly states that the registration of '.fr' domain names is open to all natural persons residing in one of the EU member states and to corporate bodies having their registered office or their principal place of business in one of the member states. This requirement will not come as a surprise to the registry for '.fr' domain names, **AFNIC**, as it had been imposed by the French government when it reappointed AFNIC as the registry for '.fr' early in 2010.

While this provision is clearly intended to open up the registration of '.fr' domain names, one may wonder whether it will - or should - be interpreted as specifying the only two categories of entities now eligible for registration of '.fr' domain names. If this is the case, it would result in the exclusion of entities not based in the European Union but holding a trademark covering France. Such entities were previously allowed to register '.fr' domain names, but the new provisions of Article L45-3 may result in them being excluded from eligibility. While this seems relatively unlikely, the new registration rules for '.fr' should clarify the situation in this respect.

Secondly, the new Article L45-1 provides that the rules relating to the allocation of domain names must not only respect IP rights (as provided for in the former text), but also freedom of communication and freedom of entrepreneurship. The reference to these two 'freedoms' results directly from the grounds on which the Constitutional Court ruled on the unconstitutional nature of the former legislation.

Thirdly, the new provisions of the code change the rules regarding the conditions under which the registration of a domain name can either be rejected or cancelled by the registry. The former provisions specifically set out categories of domain names which could not be registered by the general public (eg, the name of the French Republic, its national institutions and public services, or the names of cities, regions or departments). The new rules provide that, in theory, any name which is not likely to infringe public order, public morality or rights guaranteed by the Constitution can be registered by any eligible entity provided that the registrant has a legitimate interest to do so and acts in good faith.

In order to ensure clarity and consistency of the meaning of legitimate interest and good faith, the new act provides that a yet-to-be-adopted statutory instrument (a decree adopted after consultation with the *Conseil d'Etat* - the highest French administrative court) along with the registration rules will define how lack of legitimate interest and use of the domain name in bad faith should be interpreted. If a domain name application is rejected or a domain name deleted on the basis of these provisions, the law still requires,

World Trademark Review *Daily*

however, that the registrant must be given the possibility to make observations, provide explanations and/or regularise his or her situation.

The fourth notable point is the requirement for the registry to implement a dispute resolution procedure whereby any party can request the deletion or transfer of a domain name if it infringes the provisions of Article L45-2, namely if the domain name:

- infringes public order, public morality or rights guaranteed by the Constitution;
- infringes IP rights, unless the registrant has a legitimate interest and acts in good faith; or
- is identical or similar to the name of the French Republic, a local constituency, a national or local institution or a public service, unless the registrant has a legitimate interest and acts in good faith.

The registry, which is designated as the provider for this procedure - with the possibility, however, to designate a third party to assist, will be required to issue its decision within two months of the start of the procedure.

As a direct consequence of the modifications brought in by the new legislation, AFNIC announced that it was suspending its two main alternative dispute resolution procedures, the [PARL](#) (conducted before the [WIPO Mediation and Arbitration Centre](#)) and the [PREDEC](#) (conducted before AFNIC for obvious breaches of the former provisions), the rules of which were based on the former unconstitutional legislation. In consideration of the existing time limits for the completion of procedures conducted under the PARL and the PREDEC and the fact that no decisions on the basis of these procedures can be issued after June 30 2011, the suspensions are effective from April 15 and May 15 2011 for the PARL and for the PREDEC respectively.

Given that a number of concepts (eg, lack of legitimate interest and use of domain names in bad faith) still have to be defined by statutory instrument, entities which have solid grounds to attempt recuperation of '.fr' domain names infringing their IP rights would certainly be advised to file PREDEC complaints with AFNIC prior to May 15 2011.

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