



BELGIAN CENTRE FOR ARBITRATION AND MEDIATION

## DECISION OF THE THIRD-PARTY DECIDER

**KINGSIZE / Blue Monkey Ltd**

**Case no. 44415: kingsize.be**

### 1. The parties

1.1. Complainant: KINGSIZE, with registered office at 5000 Namur, Avenue Reine Astrid, 118;

*Represented by:*

Mr. De Vetter Julien, Owner, residing at 5537 Anhée, Rue de la Molinee, 4bt2;

1.2. Respondent: Blue Monkey Ltd, with registered office at GX11 1AA Gibraltar, Suite 4, Giro's Passage, 4;

*Represented by:*

GOLEM Domain Aftermarket, with registered office at 1070 Wien, Austria, Mariahilfer Strasse, 36;

### 2. Domain name

Domain name: "kingsize.be"  
Registered on: 3 August 2014

hereafter referred to as "the Domain Name".

### 3. Background to the case

On 12 October 2016, the Complainant filed a complaint with 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").

CEPANI – NON-PROFIT ASSOCIATION

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On 17 November 2016, CEPANI appointed Mr. Geert Glas to act as third party decider pursuant to the Rules (hereafter referred to as "Third Party Decider"). The Third Party Decider accepted this instruction and provided CEPANI with the declaration of independence in accordance with article 7 of the Rules.

Pursuant to article 6.2 of the Rules, CEPANI formally appointed the Third Party Decider in an email dated 17 November 2016 and provided him with an electronic copy of the case file, consisting of the completed complaint form (hereafter referred to as "the Complaint").

On the same day, CEPANI informed the Complainant and the Respondent of the appointment of the Third Party Decider and notified them that deliberations would be closed on 24 November 2016, with the final decision being due on 8 December 2016.

The Respondent filed a response to the Complaint.

#### **4. Factual information**

The Complainant, Kingsize, is a Belgian company specialized in branding, web creation & art direction. Kingsize also registers domain names for clients.

It appears from a notary deed that the Complainant was incorporated on 17 July 2015 under the corporate name "KINGSIZE". This same name is also used by the Complainant as its trade name.

According to the DNS Belgium WHOIS record, the Respondent, who is based in Gibraltar, has registered the Domain Name on 3 August 2014.

When entering the Domain name, the internet user is directed to a parking webpage operated by the company GOLEM Domain Aftermarket, a trading platform for domain names. On the webpage, under the Domain name, GOLEM indicates that the Domain Name is "for sale" at the price of 2.999 EUR. The Domain Name is also offered for sale on a website operated by SEDO GmbH.

From the evidence submitted by the Complainant it appears that the Complainant offered the Respondent via the website SEDO to purchase the Domain Name at a price of 500 EUR, to which the Respondent made a counter offer of 4.900 EUR.

#### **5. Position of the parties**

##### **5.1 Position of the Complainant**

The Complainant requests that the Domain Name be transferred to it since, according to the Complainant, the conditions provided for under b) 1. i - iii of the Policy are clearly met.

**(A) the Respondent's Domain Name is identical or confusingly similar to a trademark, a trade name, 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.**

The Complainant asserts that the Domain Name is identical to the Complainant's trade name and corporate name "KINGSIZE".

In addition, the term "KINGSIZE" is also used by the Complainant on every document relating to its company.

**(B) the Respondent has no rights or legitimate interests in the Domain Name.**

The Complainant submits that the Respondent has no rights or legitimate interests in the Domain Name given that none of the circumstances mentioned under b) 3 of the Policy are applicable to the Respondent.

The Complainant alleges that the Respondent has no legitimate rights or interests with respect to the Domain Name. The Complainant states that the Domain Name leads to a website called GOLEM Domain Aftermarket, a trading platform for domain names, where the Domain Name is offered for sale.

The Complainant further argues that the Respondent's corporate name has nothing to do with the Domain Name. The Complainant also argues that the Domain Name comprises a suffix.be while the Respondent is located in Gibraltar.

**(C) the Domain Name has been registered or is being used in bad faith.**

The Complainant alleges that the Respondent uses the Domain Name in bad faith. The Complainant refers to the parking of the Domain Name with GOLEM and its offering for sale of the Domain Name.

Consequently, the Complainant requests the transfer of the Domain Name registration.

**5.2 Position of the Respondent**

The Respondent is of the opinion that the registration and sale of dictionary-term domain names is a legitimate business activity. In its opinion, the term "KINGSIZE", when used in connection with its dictionary meaning (oversize; plus size; bed size) is a common generic term widely known and found in every English dictionary.

Further, the Respondent alleges that the Complainant has contacted it in order to purchase the Domain Name, but because the Complainant was not ready to pay the price of 4900 EUR as requested by the Respondent, the Complainant is now trying to obtain the transfer of the Domain Name through this dispute.

Finally, the Respondent claims that the Domain Name was registered in good faith. The Respondent stresses that the Domain Name was registered before the Complainant was incorporated and adopted "KINGSIZE" as its corporate name.

**6. Discussion and findings**

Paragraph 15.1 of the Rules instructs the Third-Party Decider on the principles that the Third-Party Decider must use in determining the dispute: "*The Third-Party Decider shall decide on the Complaint in accordance with the Policy and these Rules.*"

In accordance with article 10 of the Policy, entitled "*Dispute resolution policy*", the complainant has to assert and to prove, in compliance with the rules of procedure, that :

- (i) *the registrant's domain name is identical or confusingly similar to 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 in which the complainant has rights; and*
- (ii) *the registrant has no rights or legitimate interests in the domain name; and*
- (iii) *the registrant's domain name has been registered or is being used in bad faith.*

It appears from this provision that three cumulative conditions must be met to order the transfer of the disputed Domain Name to the Complainant.

**6.1 The registrant's domain name is identical or confusingly similar to, *inter alia*, a trademark, a trade name, a company name in which the complainant has rights.**

The Complainant claims that it has registered and uses the word "KINGSIZE" as its company name and trade name.

The Policy states that the domain name in question in any dispute must be "*identical or confusingly similar to, inter alia, a trademark, a trade name, a company name in which the complainant has rights*".

It appears from the documents of incorporation of the Complainant that "KINGSIZE" is its corporate name.

According to Belgian law, a trade name is the name which a commercial entity uses to engage in business affairs and to distinguish itself from other commercial entities. The right to use a trade name is accorded to whoever has the first visible, public and continuous use of said name (see *inter alia* D. Kaesmacher, *Les droits intellectuels*, Larcier, 2007, p.207, nr. 95).

In the case at hand, the Complainant clearly shows that it uses the trade name "KINGSIZE" to refer to its commercial entity which specializes in branding, web creation & art direction. The evidence submitted by the Complainant supports that statement.

Hence, the Third Party Decider is of the opinion that KINGSIZE is used as the Complainant's company name and trade name.

Undoubtedly, the Complainant's company name and trade name are identical to the Domain Name.

For these reasons, the Third Party Decider finds that the first condition of Article 10(b)(1) of the Policy is satisfied.

**6.2 The registrant has no rights or legitimate interests in the domain name**

Pursuant to Article 10 (b) (3) of the Policy, respondent's rights or legitimate interest to the domain name can be proved by certain circumstances. Article 10 (b) (3) of the Policy gives a non-exhaustive list of such circumstances:

- prior to any notice of the dispute, the respondent used the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services or made demonstrable preparations for such use; or

- the respondent (as an individual, business or other organization) has been commonly known by the domain name, even if he has acquired no trademark; or
- the respondent is making a legitimate and non-commercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark, trade name, social name or corporation name, geographical designation, name of origin, designation of source, personal name or name of the geographical entity at issue.

Under Article 10 (b) (3) lit 1 of the Policy, legitimate interest can be demonstrated where prior to any notice of an ADR procedure the holder of a domain name has used the domain name or a name corresponding to the domain name in connection with the offering of goods and services or has made demonstrable preparation to do so. In the case at hand, these requirements are not fulfilled. This would only be the case if one would regard the offering for sale of the Domain Name as qualifying to be in connection with the offering of goods or services. This is not what is intended by this provision (see case n°44279 – transfer.be).

When entering the Domain Name, the internet user is directed to a “parking” webpage operated by GOLEM where the Domain Name is offered for sale. Such webpage created by GOLEM cannot be considered as a proof of the bona fide offering of goods and services (see case. n° 44167 – present.be; case n° 44274 – natura.be).

Under Article 10 (b) (3) lit 2 of the Policy, legitimate interest can be demonstrated where the holder of a domain name being an undertaking, organization or natural person, has been commonly known by the domain name, even in the absence of a trade mark. This requirement does not seem to be fulfilled in the present case, nor does the Respondent allege that this would be the case.

Under Article 10 (b) (3) lit 3 of the Policy, legitimate interest can be demonstrated where the holder of a domain name is making a non-commercial or fair use of the domain name, without intent to misleadingly divert consumers for commercial gain. The requirement of non-commercial use does not seem to be fulfilled in the present case either.

Consequently none of the examples listed in Article 10 (b) (3) of the Policy are supported by the facts asserted by the Respondent. However, Article 10 (b) (3) of the Policy is non-exhaustive. One could ask the question whether a business case which consists of registering domain names and building a domain name portfolio in the hope that someday clients may wish to purchase some of these domain names at a hefty price results in a situation whereby such domain names are registered and used in good or in bad faith.

Over time, the legitimacy of domain name brokers may well have shifted in that economic activities which were generally frowned upon in the earlier days of domain names have become more mainstream.

While this debate is a most interesting one, this particular case does not hinge on its resolution. Indeed, in order for a transfer to be ordered, all three conditions need to be fulfilled cumulatively. In view of the outcome of the analysis under the condition of bad faith below, the current debate on the presence or absence of a right or legitimate interest becomes academic.

### **6.3 The registrant's domain name has been registered or is being used in bad faith**

In order to meet the third condition of Article 10(b)(1) of the Policy, the Complainant must prove that the Respondent registered or used the Domain Name in bad faith.

(a) Registration in bad faith

The Third-Party decider is of the opinion that the Domain Name was not registered in bad faith since the Respondent had no knowledge of the Complainant's business at the time of registration and the Domain Name could therefore not have been registered to target the Complainant's corporation or trade name (see *Digital Vision, Ltd. v. Advanced Chemill Systems*, WIPO Case No. D2001-0827).

Indeed, Respondent registered the Domain Name on 3 August 2014, almost a year before the Complainant was incorporated on 17 July 2015, and adopted "KINGSIZE" as its company name.

(b) Use in bad faith

According to the Complainant, the Respondent uses the Domain Name in bad faith as its only purpose is to sell the Domain Name for a higher price.

The Complainant submits evidence which proves that the Respondent offered the Domain Name for sale on the website GOLEM. The Respondent also offered the Domain Name for sale on the website SEDO.

From the evidence submitted by the Complainant it appears that the Complainant made an offer to the Respondent via the website SEDO to purchase the Domain Name for a price of 500 EUR, to which Respondent made a counter offer in the amount of 4.900 EUR.

The case at hand is somewhat uncommon in that the Domain Name is a generic word in the English language which was registered prior to the Complainant's incorporation. It should be noted that neither the company name nor the trade name of the Complainant can be said to enjoy a significant notoriety.

Moreover, the Respondent did not initiate contact with the Complainant. The Respondent responded to an offer made by the Complainant to purchase the Domain Name. The Complainant fails to show any evidence proving that the Respondent took any interest in the Complainant prior to being contacted by it. (see *Barlow Lyde & Gilber v. The Business Law Group*, WIPO Case No. D2005-0493).

As a result, the only fact which would constitute the Respondent's bad faith is that, upon receiving an offer to purchase the Domain Name, it asked for a higher price.

The price at which a domain name is being offered for sale can constitute evidence of the bad faith of its proprietor, and often does. In the absence of any other fact which can corroborate that bad faith, the Third Party Decider is however not convinced that in this specific case the mere counter offer can suffice as evidence of the Respondent's bad faith use of the Domain Name.

The Third-Party Decider therefore concludes that the third condition of Article 10 (b) (1) is not fulfilled.

Hence, as the Third-Party Decider finds that the three conditions of Article 10 (b) (1) have not all been fulfilled, the Complaint is unfounded.

## 7. Decision

Consequently, in accordance with Article 10 (e) of the Policy, the Third Party Decider orders that the Domain Name "**kingsize.be**" should not be transferred to the Complainant.

Brussels, 8 December 2016.



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Geert Glas

The Third Party Decider