

## **ADMINISTRATIVE PANEL DECISION**

ELO v. MARC KONAN

Case No. D2023-4339

### **1. The Parties**

The Complainant is ELO, France, represented by CSC Digital Brand Services Group AB, Sweden.

The Respondent is MARC KONAN, Côte d'Ivoire.

### **2. The Domain Name and Registrar**

The disputed domain name <auchan-fra.com> is registered with OVH (the "Registrar").

### **3. Procedural History**

The Complaint was filed in English with the WIPO Arbitration and Mediation Center (the "Center") on October 19, 2023. On October 19, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On October 20, 2023, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the disputed domain name which differed from the named Respondent (Redacted for Privacy) and contact information in the Complaint. The Center sent an email communication to the Complainant on October 23, 2023, providing the registrant and contact information disclosed by the Registrar, and inviting the Complainant to submit an amendment to the Complaint. The Complainant filed an amended Complaint on October 24, 2023.

On October 23, 2023, the Center informed the parties in French and English, that the language of the registration agreement for the disputed domain name is French. On October 24, 2023, the Complainant confirmed its request that English be the language of the proceeding. The Respondent did not submit any comment on the Complainant's submission.

The Center verified that the Complaint together with the amended Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the "Policy" or "UDRP"), the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules"), and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the "Supplemental Rules").

In accordance with the Rules, paragraphs 2 and 4, the Center formally notified the Respondent of the Complaint, and the proceedings commenced on October 30, 2023. In accordance with the Rules, paragraph 5, the due date for Response was November 19, 2023. The Respondent did not submit any response.

Accordingly, the Center notified the Respondent's default on November 20, 2023.

The Center appointed Alissia Shchichka as the sole panelist in this matter on November 30, 2023. The Panel finds that it was properly constituted. The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

#### **4. Factual Background**

The Complainant is ELO, previously known as Auchan Holding SA, a multinational retail group headquartered in France since its establishment in 1960. Operating in 12 countries across Europe and Africa, the Complainant maintains a global workforce of 161,476 employees as of December 2021. Its consolidated revenue, excluding taxes, surpassed EUR 30 billion.

The Complainant has evidenced to be the registered owner of numerous trademark registrations, including, but not limited, to the following:

- International registration No. 939832, registered on February 27, 2007, for the word mark AUCHAN, in classes 1 to 45;
- International registration No. 952847, registered on August 10, 2007, for the word mark AUCHAN, in classes 9, 35, and 38;
- French registration No. 1258525, registered on June 5, 1984, for the word mark AUCHAN, in classes 1 to 45.

The Complainant also owns numerous domain names that contain the trademark AUCHAN, including its primary domain name <auchan.fr>, registered on February 10, 1997.

The disputed domain name was registered on December 1, 2022. The disputed domain name currently displays an inactive webpage. According to the evidence provided by the Complainant, the Respondent has used the disputed domain name in connection with a phishing email scheme impersonating an employee of the Complainant and attempting to obtain sensitive personal information whilst offering false business deals.

#### **5. Parties' Contentions**

##### **A. Complainant**

The Complainant contends that it has satisfied each of the elements required under the Policy for a transfer of the disputed domain name.

Notably, the Complainant's contentions can be summarized as follows:

The Complainant submits that the Complainant's AUCHAN trademark is clearly included and recognizable in the disputed domain name. The addition of the letters "fra" (likely for "France") and a hyphen to the end of the AUCHAN trademark, does not alter the overall impression that the disputed domain name is associated with the Complainant's trademark or prevent the likelihood of confusion between the disputed domain name and the Complainant and its trademarks.

In respect of the generic Top-Level Domain ("gTLD") ".com", which forms part of the disputed domain name, the Complainant requests that the Panel disregard it under the first element as it is a standard registration requirement.

The Complainant contends that the Respondent has no rights or legitimate interests in the disputed domain name. The Respondent is not commonly known by the disputed domain name, has not used or prepared to

use the disputed domain name in connection with a *bona fide* offering of goods or services, and has not been authorized, licensed, or otherwise permitted by the Complainant to register and/or use the disputed domain name.

The Complainant further contends that the trademark AUCHAN is widely known, and the Respondent knew about the Complainant's trademark, which evidences bad faith registration. Furthermore, the Complainant submits that the disputed domain name being pointed to an inactive page, is passively held. Finally, the Complainant presents evidence of the use of the disputed domain name in connection with a phishing scheme, wherein the Respondent impersonated an employee of the Complainant and attempted to collect sensitive personal information. Such use cannot be considered a *bona fide* offering of goods or services.

Therefore, the Complainant alleges that the registration and use of the disputed domain name was, and currently is, in bad faith.

## **B. Respondent**

The Respondent did not reply to the Complainant's contentions.

## **6. Discussion and Findings**

### **6.1 Language of the Proceedings**

The language of the Registration Agreement for the disputed domain name is French. Pursuant to the Rules, paragraph 11(a), in the absence of an agreement between the parties, or unless specified otherwise in the registration agreement, the language of the administrative proceeding shall be the language of the registration agreement.

The Complaint was filed in English. The Complainant requested that the language of the proceeding be English for several reasons, including the fact that the disputed domain name was used for sending fraudulent emails in English, thereby demonstrating the Respondent's proficiency in the language. The Complainant asserts that any additional delay in addressing the abusive disputed domain name poses a continued risk of fraud to both the Complainant and its unsuspecting consumers. Finally, the Complainant argues that due to the Respondent's misappropriation of the Complainant's trademark and the fraudulent use of the disputed domain name, translation would unduly burden the Complainant, which has already invested significant time and resources.

The Respondent did not make any specific submissions with respect to the language of the proceeding.

In exercising its discretion to use a language other than that of the registration agreement, the Panel has to exercise such discretion judicially in the spirit of fairness and justice to both parties, taking into account all relevant circumstances of the case, including matters such as the parties' ability to understand and use the proposed language, time and costs (see WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)"), section 4.5.1).

Having considered all the matters above, the Panel determines under paragraph 11(a) of the Rules that the language of the proceeding shall be English.

### **6.2. Substantive Issues**

Under paragraph 4(a) of the Policy, the Complainant carries the burden of proving:

- (i) that the disputed domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights; and

- (ii) that the Respondent has no rights or legitimate interests in respect of the disputed domain name; and
- (iii) that the disputed domain name has been registered and is being used in bad faith.

The Respondent's default in the case at hand does not automatically result in a decision in favor of the Complainant, however, paragraph 5(f) of the Rules provides that if the Respondent does not submit a response, in the absence of exceptional circumstances, the Panel shall decide the dispute solely based upon the Complaint.

Further, according to paragraph 14(b) of the Rules, the Panel may draw such inferences from the Respondent's failure to submit a response as it considers appropriate.

#### **A. Identical or Confusingly Similar**

It is well accepted that the first element functions primarily as a standing requirement. The standing (or threshold) test for confusing similarity involves a reasoned but relatively straightforward comparison between the Complainant's trademark and the disputed domain name. [WIPO Overview 3.0](#), section 1.7.

Based on the available record, the Panel finds the Complainant has shown rights in respect of a trademark or service mark for the purposes of the Policy. [WIPO Overview 3.0](#), section 1.2.1.

The Panel finds the entirety of the mark is reproduced within the disputed domain name. Accordingly, the disputed domain name is confusingly similar to the mark for the purposes of the Policy. [WIPO Overview 3.0](#), section 1.7.

While the addition of other terms (here, the term "fra" as an abbreviation for the term "France") may bear on assessment of the second and third elements, the Panel finds the addition of such term does not prevent a finding of confusing similarity between the disputed domain name and the Complainant's AUCHAN trademark for the purposes of the Policy. [WIPO Overview 3.0](#), section 1.8.

Based on the available record, the Panel finds the first element of the Policy has been established.

#### **B. Rights or Legitimate Interests**

Paragraph 4(c) of the Policy provides a list of circumstances in which the Respondent may demonstrate rights or legitimate interests in a disputed domain name.

Although the overall burden of proof in UDRP proceedings is on the complainant, panels have recognized that proving a respondent lacks rights or legitimate interests in a domain name may result in the difficult task of "proving a negative", requiring information that is often primarily within the knowledge or control of the respondent. As such, where a complainant makes out a *prima facie* case that the respondent lacks rights or legitimate interests, the burden of production on this element shifts to the respondent to come forward with relevant evidence demonstrating rights or legitimate interests in the domain name (although the burden of proof always remains on the complainant). If the respondent fails to come forward with such relevant evidence, the complainant is deemed to have satisfied the second element. [WIPO Overview 3.0](#), section 2.1.

Having reviewed the available record, the Panel finds the Complainant has established a *prima facie* case that the Respondent lacks rights or legitimate interests in the disputed domain name. The Respondent has not rebutted the Complainant's *prima facie* showing and has not come forward with any relevant evidence demonstrating rights or legitimate interests in the disputed domain name such as those enumerated in the Policy or otherwise.

In particular, panels have held that the use of a domain name for illegal activity (e.g., the sale of counterfeit goods or illegal pharmaceuticals, phishing, distributing malware, unauthorized account access/hacking, impersonation/passing off, or other types of fraud) can never confer rights or legitimate interests on a respondent. [WIPO Overview 3.0](#), section 2.13.1. In this context, this Panel has noted that the disputed domain name has been used in connection with a phishing scheme, where the Respondent impersonated an employee of the Complainant and attempted to collect sensitive financial information. Such use of the disputed domain name may, therefore, not confer any rights or legitimate interests within the meaning of the Policy.

Based on the available record, the Panel finds the second element of the Policy has been established.

### **C. Registered and Used in Bad Faith**

The Panel notes that, for the purposes of paragraph 4(a)(iii) of the Policy, paragraph 4(b) of the Policy establishes circumstances, in particular, but without limitation, that, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith. Also, panels have held that the use of a domain name for illegal activity (e.g., the sale of counterfeit goods or illegal pharmaceuticals, phishing, distributing malware, unauthorized account access/hacking, impersonation/passing off, or other types of fraud) constitutes bad faith. [WIPO Overview 3.0](#), section 3.4.

Moreover, using the disputed domain name for illegal phishing activities by sending fraudulent emails under it, thereby impersonating an employee of the Complainant, with the aim of acquiring sensitive information from at least one of the Complainant's customers for illegitimate financial gain, is a clear indication that Respondent intentionally attempted to attract, for commercial gain, Internet users to its own email communication by creating a likelihood of confusion with the Complainant's AUCHAN trademark as to the source, sponsorship, affiliation or endorsement of the Respondent's phishing emails. Such circumstances are evidence of registration and use of the disputed domain name in bad faith within the meaning of paragraph 4(b)(iv) of the Policy (see also [WIPO Overview 3.0](#), section 3.4).

Based on the available record, the Panel finds that the Complainant has established the third element of the Policy.

### **7. Decision**

For the foregoing reasons, in accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the disputed domain name <auchan-fra.com> be transferred to the Complainant.

*/Alissia Shchichka/*

**Alissia Shchichka**

Sole Panelist

Date: December 7, 2023