

Reconsideration Request Form

Version of 11 April 2013

ICANN's Board Governance Committee is responsible for receiving requests for reconsideration from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information. Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <http://www.icann.org/en/general/bylaws.htm#IV> and <http://www.icann.org/en/committees/board-governance/>.

This form is provided to assist a requester in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12 point font.

For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.

Please submit completed form to reconsideration@icann.org.

1. Requester Information

Name: Amazon EU S.à.r.l.

Address: 5 Rue Plaetis L-2338 Luxembourg

Email: lorna.gradden.am3@valideus.com

Phone Number (optional):

C/o:

Name: Flip Petillion, Crowell & Moring LLP

Address: 7, rue Joseph Stevens

Email: fpetillion@crowell.com

Phone Number (optional): +32(2)2142886

(Note: ICANN will post the Requester's name on the Reconsideration Request page at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>. Requestors address, email and phone number will be removed from the posting.)

2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

(Provide as much detail as available, such as date of Board meeting, reference to Board resolution, etc. You may provide documents. All documentation provided will be made part of the public record.)

Amazon EU S.à.r.l (hereinafter "Requester") seeks reconsideration of ICANN's acceptance of the Expert Determination of the New gTLD String Confusion Objection regarding the strings .SHOP (Application ID 1-1830-1672) and .通販 (Application ID 1-1318-15593) by the International Centre for Dispute Resolution in Case No. 50 504 T 00261 13, dated August 21, 2013 (hereinafter, the 'Decision'). The Decision is attached as **Annex 1**. This decision not only fails to follow ICANN process for instituting an action and for determining string confusion – finding .SHOP and .通販 (Japanese for "online shopping") to be confusingly similar strings – but also places Requester's .通販 application in contention with Requester's own .SHOP application.

4. Date of action/inaction:

(Note: If Board action, this is usually the first date that the Board posted its resolution and rationale for the resolution or for inaction, the date the Board considered an item at a meeting.)

August 21, 2013

5. On what date did you become aware of the action or that action would not be taken?

(Provide the date you learned of the action/that action would not be taken. If more than fifteen days has passed from when the action was taken or not taken to when you learned of the action or inaction, please provide discussion of the gap of time.)

August 21, 2013

6. Describe how you believe you are materially affected by the action or inaction:

The Requester is one of nine applicants for *inter alia* the .SHOP gTLD (Application ID 1-1317-37897) and the only applicant for the .通販 gTLD. The Decision will impact the Requester because ICANN has made it clear in the Applicant Guidebook that it “*will not approve applications for proposed gTLD strings that are identical or that would result in user confusion, called contending strings*” (Applicant Guidebook, Module 4-2). ICANN refers to a group of applications for contending strings as a contention set. The Decision places .SHOP and .通販 in a non-exact match contention set, not only against the objector, Jeffrey S. Smith on behalf of Commercial Connect, LLC (“Commercial Connect”) and other third parties, but against the Requester itself. As a result, ICANN will not approve both the application for .SHOP and the application for .通販.

This directly impacts the Requester as follows:

- The Requester will not be allowed to operate a .SHOP gTLD in the event that the .通販 gTLD is recommended for delegation and *vice versa*;
- If the Requester wants to operate either the .SHOP gTLD or the .通販 gTLD, it will need to either negotiate with other Applicants for .SHOP or participate at an auction with a view to obtaining the delegation of either the .SHOP or the .通販

gTLD. This may require additional investments which are not justified, given the erroneous nature of the Decision and the discrimination resulting from it (*infra*); and

- The Requester must now choose which of its applications it wishes to proceed as Requester is now in contention with its own .SHOP application. The panelist's decision is forcing Requester to withdraw one of its applications, forgoing its significant investment in seeing the application through to date, even though other applications representing strings closer in meaning than Requester's own applications are being allowed through.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

Various third parties are adversely affected by the Decision:

- Other applicants for .SHOP will be put in a contention set with .通販, meaning that Internet users will not be able to benefit from services under a .SHOP if the .通販 gTLD is delegated.
- Internet users will not be able to benefit from services under the .通販 gTLD if the .SHOP gTLD is delegated or they will not be able to benefit from services under the .SHOP gTLD if the .通販 is delegated.

As made clear by ICANN regarding the standard for objections, “[t]here is a presumption generally in favor of granting new gTLDs to applicants who can satisfy the requirements for obtaining a gTLD – and, hence, a corresponding burden upon a party that objects to the gTLD to show why that gTLD should not be granted to the applicant”

(New gTLD Draft Applicant Guidebook Version 3 – Public Comments Summary and Analysis, p. 67, available at <http://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf>). The string similarity process was not intended to “*hobble competition or reserve a broad set of string for a first mover*” [sic]. As a result, the similarity test is a high bar, not to limit legitimate competition. (See New gTLD Draft Applicant Guidebook-Version 2: Analysis of Public Comment, p. 149, available at <http://archive.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf>).

In the case at hand, accepting the Decision would unjustifiably (*infra*) limit choice for Internet users and limit legitimate competition. This is not in the interest of the Internet user.

Internet users are adversely affected as there may be less competition at a TLD level as well as fewer TLDs targeted at non-English speaking communities.

8. Detail of Board or Staff Action – Required Information

Staff Action: If your request is in regards to a staff action or inaction, please provide a detailed explanation of the facts as you understand they were provided to staff prior to the action/inaction presented to the staff and the reasons why the staff’s action or inaction was inconsistent with established ICANN policy(ies). Please identify the policy(ies) with which the action/inaction was inconsistent. The policies that are eligible to serve as the basis for a Request for Reconsideration are those that are approved by the ICANN Board (after input from the community) that impact the community in some way. When reviewing staff action, the outcomes of prior Requests for Reconsideration challenging the same or substantially similar action/inaction as inconsistent with established ICANN policy(ies) shall be of precedential value.

Board action: If your request is in regards to a Board action or inaction, please provide a detailed explanation of the material information not considered by the Board. If that information was not presented to the Board, provide the reasons why you did not submit the material information to the Board before it acted or failed to act. “Material information” means facts that are material to the decision.

If your request is in regards to a Board action or inaction that you believe is based upon inaccurate, false, or misleading materials presented to the Board and those materials formed the basis for the Board action or inaction being challenged, provide a detailed explanation as to whether an opportunity existed to correct the material considered by the Board. If there was an opportunity to do so, provide the reasons that you did not provide submit corrections to the Board before it acted or failed to act.

Reconsideration requests are not meant for those who believe that the Board made the wrong decision when considering the information available. There has to be identification of material information that was in existence of the time of the decision and that was not considered by the Board in order to state a reconsideration request. Similarly, new information – information that was not yet in existence at the time of the Board decision – is also not a proper ground for reconsideration. Please keep this guidance in mind when submitting requests.

Provide the Required Detailed Explanation here:

Although the String Similarity Review was performed by a third party, ICANN has determined that the Reconsideration process can properly be invoked for challenges of the third party's decisions where it can be stated that either the vendor failed to follow its process in reaching the decision, or that ICANN staff failed to follow its process in accepting that decision (Recommendation of the Board Governance Committee (BGC) Reconsideration Request 13-5, August 1, 2013, page 4).

The new gTLD program included a dispute resolution procedure pursuant to which disputes between a person or entity who applies for a new gTLD and a person or entity who objects to that gTLD are resolved in accordance with the so-called New gTLD Dispute Resolution Procedure (Article 1(b), New gTLD Dispute Resolution Procedure (hereinafter, the 'Procedure'). Pursuant to Article 1(c) of the Procedure, Dispute resolution proceedings shall be administered by a Dispute Resolution Service Provider (DRSP) in accordance with the Procedure and the applicable DRSP Rules. In accordance with Article 20(a) the Panel appointed by the DRSP had to apply the standards that have been defined by ICANN.

In the present case, both the DRSP and the Panel have derogated from the Procedure and the Panel has failed to apply the standard defined by ICANN in reaching his Decision (*infra*). As a result, the policy for dealing with disputes has not been followed. Accepting the Decision as an expert determination and advice would thus be contrary ICANN's policy, as ICANN would accept an expert determination that was not made in accordance with ICANN's policy.

In any event, ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition (Article II(3), ICANN Bylaws). In the impossible event that ICANN considers that accepting the Decision is not contrary to its policies, accepting the Decision would create inequitable and disparate treatment without justified cause. ICANN could allow for a derogation to its policy, that is in line with the policy. Indeed, the Procedure provides that parties cannot derogate from the Procedure without the express approval of ICANN. *A contrario*, ICANN can (and must) give its express approval to derogate from the Procedure, if this permits ICANN to apply its standards, policies and procedures in a non-discriminatory manner.

9. What are you asking ICANN to do now?

(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)

The Requester asks ICANN to reject the advice set forth in the Decision, and instruct a panel to make an expert determination that applies the standards defined by ICANN. Should ICANN consider that there is a need to derogate from the Procedure in order to

comply with the process defined in the Applicant Guidebook, the Requester asks to make the necessary derogations allowing for a non-discriminatory application of ICANN's standards, policies and procedures.

10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is a directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration. The requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested from the BGC must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board's decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)

Both the DRSP and the appointed Panel accepted an objection that was filed incorrectly

On April 11, 2013, the ICDR informed Requester's primary contact for several of its new gTLD applications that it had conducted an administrative review of an objection filed by Commercial Connect (the 'Objection') and that it had noted that "after rectifying deficiencies previously set forth" the Objection "complies with Articles 5-8 of the *New gTLD Dispute Resolution Procedure* and the applicable ICDR (DRSP) Rules" and "shall be registered for processing" (**Annex 3**).

However:

1. The Requester had **not** received any formal objection, nor had it received any

copy of an objection in compliance with Article 7(b) of the *New gTLD Dispute Resolution Procedure*. Not copying the Applicant is a deficiency that cannot be rectified under the New gTLD Dispute Resolution Procedure;

2. In an email of March 18, 2013, the ICDR acknowledged receipt of the Objection by Commercial Connect with reference to Case number 50 504 T 00261 13. There is no reference to the string being objected to in this email. To wit: in its email of April 4, 2013, the ICDR specifically requested Commercial Connect to provide “proof or statement” that copies of the objection were sent to Requester.
3. Subsequently, the Requester has received the following documents from the Objector:
 - a copy of an application for .SHOP by Commercial Connect;
 - an ‘ONLINE FILING DEMAND FOR ARBITRATION/MEDIATION FORM’ that refers to the string ‘xn--gk3at1e Online Shopping’. (No objection against this string was published in either ICANN’s Dispute Announcement, nor in the ICDR’s list of filed objections.);
 - a ‘Dispute Resolution Objection’ with blank unfilled spaces where the string applicant and relevant string would otherwise appear;
 - a TLD Application for .mall, .shop, and .svc submitted by Commercial Connect (October 11, 2000);
 - a copy of a mail of April 5, 2013 to the ICDR in which Mr Smith writes “We

do hereby certify that copies of the complaint and attachments were sent via email to all respondents and to DRDiling@icann.org in particular...”.

On April 19, 2013 the Requester informed the ICDR that it had not received an objection on-time and that it did not know if an objection was filed on-time with the ICDR or not. The Requester also informed the ICDR that it had neither been informed of, nor received any information that allowed it to conclude that any previously set forth deficiencies in the Objection had been rectified timely. The Requester requested the ICDR to disregard and dismiss the Objection (**Annex 4**).

On April 24, 2013, the Requester reiterated this request (**Annex 5**).

On May 3, 2013, the ICDR informed the Requester that the matter would proceed to an Expert for determination and that the issues outlined in the Requester’s letters may be raised as part of the response (**Annex 6**).

Despite the clear violation of the Procedure by Commercial Connect, both the DRSP and the appointed Panel decided to proceed and to issue an expert determination in contravention of the Procedure.

The appointed Panel did not apply the standard, defined by ICANN

- The standard, defined by ICANN

As explained above, according to ICANN’s policy, panels appointed by the DRSP have the obligation to apply the standards that have been defined by ICANN. For a string confusion objection, the standard to be applied by the panel as defined by ICANN is defined in Section 3.5.1 of the Applicant Guidebook:

“A DRSP panel hearing a string confusion case objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For the likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.”

ICANN has made it clear that this is a high standard, not intended to hobble competition or reserve a broad set of string for a first mover. Synonyms of TLDs do not automatically cause confusion:

“[T]he standard indicates that confusion must be probable, not merely possible, in order for this sort of harm to arise. Consumers also benefit from competition. For new gTLDs, the similarity test is a high bar, as indicated by the wording of the standard. A TLD string that is a dictionary word will not automatically exclude all synonyms of that word (and most TLD strings today are not dictionary words and have no real synonyms).

Therefore, while the objection and dispute resolution process is intended to address all types of similarity, the process is not intended to hobble competition or reserve a broad set of string for a first mover.” (New gTLD Draft Applicant Guidebook-Version 2: Analysis of Public Comment, p. 149, available at <http://archive.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf>)

In addition, the translation of a word does not automatically generate confusing similarity. In this respect, ICANN stated:

“Leaving aside the issues whether all strings can be translated, whether translations would constitute grounds for findings of confusing similarity can be examined on a case-by-case basis through the objections and dispute resolution procedures that are in place.

[...]

The cases when a party states there might be confusion due to translation are better left for dispute resolution.”

In other words, the translation of a word does not necessarily create confusing similarity with the average Internet user. A case-by-case examination would not be necessary if the opposite were true.

It is indeed the case that no confusion can possibly exist with an average reasonable Internet user who understands different languages and/or scripts when there is no aural or visual similarity. This Internet user will immediately understand the difference between the two strings in the same way that he understands that both languages are different. The Internet user who does not understand both languages will not be able to compare both strings to each other and will not be confused between a string that has a meaning to him and a second string of which he does not understand the meaning.

It is in accordance with this high standard that panels had to rule on confusing similarity

between two strings.

- The application of a different standard in the decision

A different standard than the one defined by ICANN was applied in the Decision putting .SHOP and .通販 in a contention set. It is undisputed that there is no visual or aural link between .SHOP and .通販. The only link that could exist between these two strings is conceptual. Given the fact that a mere translation of a word would be insufficient to create confusing similarity in the mind of the average, reasonable Internet user, there cannot be confusing similarity according to the standard that the panel had to apply.

However, the panel used a different standard, considering that “*the use of essentially the same word in two different languages is sufficient to cause string confusion among the average, reasonable Internet user*” (**Annex 1**). This is in contradiction with ICANN’s standard stating that “*whether translations would constitute grounds for findings of confusing similarity can be examined on a case-by-case basis.*” If a translation was sufficient for a finding of confusing similarity, this would have been taken up in the standard and a case-by-case analysis would not be required. ICANN certainly did not consider that the mere translation of a string was in itself ‘sufficient’ ground for a finding of confusingly similarity. Nevertheless, this is the standard that was applied in the Decision in contravention of ICANN’s policy.

In addition ‘通販’ is not even a translation of the word ‘shop’, since ‘通販’ means ‘online shopping’. So, even if ICANN considered that the use of essentially the same word in two different languages is sufficient to cause string confusion among the average, reasonable Internet user, *quod non*, ‘通販’ and ‘shop’ could not be found confusingly

similar, as they have clearly distinct meanings.

The fact that the appointed panel did not use the correct standard is also shown by the Expert Determination in another ICDR objection involving the strings .SHOP and .购物, which is the Chinese word for ‘shop’ (**Annex 2**). In that Expert Determination, the appointed panelist applied the standard, defined by ICANN and came to the conclusion that the strings .SHOP and .购物 are not confusingly similar. It is self-evident that the strings of that case have more in common than the .通販 and .SHOP strings, as the former are identical in meaning, whereas the meaning of the latter strings is clearly different. As a result, it is clear that different standards were applied by both panels. Indeed, if the same standard was applied, it would have been impossible that strings that are more similar to each other are not confusingly similar, while less similar strings are considered confusingly similar (and thus more similar). This constitutes a *contradictio in terminis*, showing that the panel ruling on the string confusion objection between .通販 and .SHOP applied a different standard.

The appointed Panel involved a third string in his determination

Finally, the panel did not limit his examination of string similarity to the similarity between the .通販 and the .SHOP strings, but involved a third string, namely ‘shopping’.

The panel considered:

“The concurrent use of ‘shopping’, the particle of the root word ‘shop’, in a gTLD string will result in probable confusion by the average, reasonable Internet user, because the two strings have virtually the same sound, meaning, look and feel.”

(Annex 1)

However, the word 'shopping' as such is not used and does not appear in either the .通販 or the .SHOP string. By comparing both the .通販 and the .SHOP string with the 'shopping' string, the panel actually made a finding that the .通販 and the .SHOP string are in 'indirect string contention'. This is beyond the scope of the task of the DRSP under ICANN's policy.

Also for this reason, the Decision is contrary to ICANN's policy.

Conclusion

ICANN's established policy was violated in many respects as 1) the DRSP and the appointed Panel proceeded with issuing an expert determination in a case that was not filed in accordance with the Procedure from which parties could not derogate without the express approval of ICANN, 2) the Panel did not apply the standard defined by ICANN, and 3) the Panel involved third strings in his expert determination, beyond the scope of the dispute resolution and interfering with ICANN's policy.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

Do you have any documents you want to provide to ICANN?

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

1. Expert Determination in the matter before the ICDR with case number 50 504 T 00261 13
2. Expert Determination in the matter before the ICDR with case number 50 504 T 00258 13
3. Communication by the ICDR of April 11, 2013
4. Communication by the Requester of April 19, 2013
5. Communication by the Requester of April 24, 2013
6. Communication by the ICDR of May 3, 2013

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.



Signature

September 4, 2013

Date