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ICANN Board Governance Committee
Mr. Bruce Tonkin, Chairman
Members of the Board Governance Committee

By e-mail: reconsideration@icann.org

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Request 13-21 (European Lotteries)
Expert Determination dated 9 December 2013 regarding .LOTTO (EXP/422/ICANN/39)
European State Lotteries and Toto Association's Request for Reconsideration dated 23 December 2013

Dear Mr. Tonkin,
Dear Members of the Board Governance Committee,

On behalf of Afilias Ltd. (hereinafter "**Afilias**"), we would like to comment on the Reconsideration Request no. 13-21 against the International Chamber of Commerce ("**ICC**") Expert Determination of 9 December 2013 in case no. EXP/422/ICANN/39 regarding .LOTTO.

On 9 December 2013, Mr. Clive Duncan Thorne, appointed Expert in the aforementioned case, decided to dismiss the Objection filed by European State Lotteries and Toto Association (hereinafter the "**Requester**") against the delegation of the .LOTTO string to Afilias (the "**Determination**"). The Objection was unsubstantiated, as it did not meet all of the criteria set out in art. 3.5.4 of the ICANN gTLD Applicant Guidebook (the "**AGB**") for a community objection against the delegation of a gTLD.

On 23 December 2013, the Requester filed a Reconsideration Request asking the Board Governance Committee to reconsider the Determination and either to reverse the Determination and reject Afilias' application for the .LOTTO string or to appoint another expert to reexamine the case

and, in subsidiary order, to issue an intermediate decision ordering the ICC to disclose certain process-related documents and communication as well as to order a hearing, if necessary.

On behalf of Afilias we move to dismiss the Request in its entirety. The Request has to be rejected as the Requester has chosen an inadmissible means of appeal against the Determination which both parties have agreed to be binding for the case at hand (see below **I.**). In addition, the Request is unsubstantiated because the Determination does not violate ICANN's policies. Thus, the Request does not meet the criteria set out in art. IV sec. 2.2.(a) of ICANN's Bylaws for a Reconsideration Request against ICANN staff action (see below **II.**).

I. Inadmissible means of appeal

Under art. 12.3 of the ICC Expertise Rules and no. 8 of the ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure, the Determination was accepted by both parties as binding. Under art. 1(d) of the ICANN New gTLD Dispute Resolution Procedure (the "**Procedure**"), by filing an objection to a new gTLD, an objector accepts the applicability of the Procedure and the applicable DRSP's rules (here: the Rules for Expertise of the ICC). Neither the Procedure nor ICC's Rules for Expertise provide for an appeal against an expert's determination or allow an objector to overrule an expert's determination by way of a Reconsideration Request to ICANN. Thus, as the Requester has rightly acknowledged on page 6 of the Request, the reconsideration procedure is not a means to correct an expert determination if the unsuccessful party is not ready to accept the outcome of the objection procedure. Consequently, in its Resolution 2013.11.05.NG02 regarding Request no. 13-7 (DISH DBS Corp.), the ICANN New gTLD Program Committee decided to reject a Reconsideration Request on the basis of the Board Governance Committee's findings that

> "in the context of the New gTLD Program, Reconsideration is not a mechanism for direct, de novo appeal of panel decisions with which the requester disagrees, and seeking such relief is, in fact, in contravention of the established processes within ICANN."

Similarly, Art. 21(d) of the procedure states that

> "the remedies available to an Applicant or an Objector pursuant to any proceeding before the Panel shall be limited to the success or dismissal of an Objection and to the refund of the DRSP to the prevailing party (...)."

Thus, under art. IV sec. 2.2(a) of ICANN's Bylaws, a Reconsideration Request can only be successful if the Requester can prove that the Expert has violated ICANN's policies. As demonstrated below, these requirements are not met in the case at hand, as the Determination is in full compliance with ICANN's policies. Thus, the Request should be rejected as inadmissible as it is no suitable and available means of appeal against an expert's determination in a new gTLD objection procedure.

II. No violation of ICANN policies

In addition, the Request is not substantiated. Apart from disagreeing with the outcome of the objection procedure (which, by itself, cannot justify a Reconsideration Request) and leaving aside both irrelevant yet inappropriate side blows against Afilias and non state-owned operators of games of chance as well as unprofessionally rude language against the Expert, the Requester fails to demonstrate that the Determination constitutes a violation of ICANN's policies.

The Requester claims that the Expert has allegedly violated the following provisions of ICANN's policies:

- Art. 20(a) of the Procedure
- sec. 3.5.4 of the AGB
- art. I.8 of the ICANN Bylaws
- art. II.3 of the ICANN Bylaws
- art. 4 of the Articles of Incorporation of Internet Corporation for Assigned Names and Numbers.

However, the Expert has correctly referred to all applicable ICANN policies and carefully considered and balanced both parties' arguments before coming to the correct conclusion that the Requester's Objection had to be dismissed. In doing so, the Expert rightly distinguished between the arguments of a party, which have to be conclusive in itself, and the evidence produced by such party to sustain its arguments.

While it is true that the market for lotteries and other games of chance is regulated in most countries, the Requester has failed to provide evidence that the operation of the .LOTTO string by Afilias would create a likelihood of material detriment to the community to which the string may be targeted. As Afilias set out in much detail in our Re-

sponse to the Objection, the proposed registry policies contain extensive state of the art security measures to prevent illegal, malicious or fraudulent use of the applied-for gTLD, to ensure a well-regulated registration process preventing unqualified or incomplete registrations and to protect the rights of third parties (p. 10 et seq. of Response dated 13 May 2013, annex 3 to Request). These provisions ensure that during operation of the applied-for string, all recommendations of the GAC Communiqué dated 11 April 2013 on the operation of strings linked to regulated markets will be observed.

As the Requester has not provided evidence for the alleged likelihood of material detriment to the community to which the .LOTTO string may be targeted, the Expert has correctly applied sec. 3.5 of the AGB under which the objector bears the burden of proof whether the criteria for a community objection are fulfilled (see also sec. 3.2 of the Determination). Thus, the Expert was right in rejecting the Objection as it did not meet all criteria for a community objection under sec. 3.5.4 of the AGB. This decision does not violate any of ICANN's policies cited by the Requester but is in fact fully in line with ICANN's policies regarding the delegation of new gTLD which, by definition, shall be open to all registrants meeting registry requirements.

More specifically:

1. **Alleged damage to the reputation of the community invoked (p. 9 of the Request)**

   The Requester complains that the Expert has allegedly required proof of actual harm to the community invoked by the operation of the applied for gTLD, while the AGB only call for a *likelihood* of such material detriment for a community objection to be successful. This proposition is wrong.

   Apart from the mere wording of sec. 9.10 of the Determination cited by the Requester, it is clear from the context that the Expert has applied the correct standards in assessing whether the Requester was able to prove a likelihood of material detriment to the community invoked. In addition, the Expert has correctly cited the applicable provisions of the AGB. As "it is beyond doubt that the Applicant Guidebook (...) does not require from the objector that he establishes *actual* harm" (page 8 of the Request), there is no indication that the Expert deviated from these standards in the case at hand. Rather, at the beginning of his review, the Expert explicitly stated that "the Objector must prove that the application creates a **likeli-**

hood of material detriment" to the community invoked (cf. sec. 9.1 of the Determination, emphasis added).

However, the expert was not convinced that the Requester provided sufficient evidence when claiming such likelihood of material detriment in the Objection. This does not mean that the Expert required proof of an *actual* damage to the community invoked. Apart from rather generic remarks about the use of the applied-for string by "unlicensed" operators of games of chance resulting in "significant consumer harm" (e.g. p. 3 of the Request), all of which are in essence purely ideological allegations which had already been rebutted in the Response to the Objection, the Requester was not able to specify further on such potential harm or produce any examples for such harmful activities. As unlicensed gaming services are already available on the internet, the Requester would at least have been able to give examples for future potential harmful or fraudulent activities by unlicensed operators should the claimed likelihood of detriment for consumers exist as a consequence of the delegation of the .LOTTO gTLD to Afilias. As the burden of proof lies with the Objector, the Expert rightly dismissed the Objection.

2. Acting in accordance with the interests of the community or of users (p. 9 et seq. of the Request)

The Requester further complains that the Expert was wrong in allegedly requiring evidence that Afilias does not have sufficient anti-abuse policies in place to avoid fraudulent or criminal use of the applied-for gTLD. According to the Requester, it is impossible to provide such proof before the respective registry policies have been put in place after delegation of the applied-for gTLD.

Again, as the burden of proof lies with the objector, the Expert was right to require the Requester to substantiate his opposition against the delegation of the applied-for gTLD, including evidence that the proposed registry policies are inadequate. Having considered both parties' arguments, the Expert was not convinced by the Requester's case as risks of illegal or fraudulent activities claimed by the Requester would not necessarily be prevented by the mere fact that the members of the Objector are State owned or State controlled. In addition, the Expert was convinced that Afilias' proposed registry policies will be sufficient to prevent malicious use of the applied-for string (cf. sec. 9.17 of the Determination). The Requester's assertion that Afilias would not provide adequate registry policies does

not only lack any basis but almost amounts to a defamatory allegation given the fact that Afilias has a long experience as a well-known and established registry operator. Thus, the Expert was right to decide that the Requester failed to prove Afilias' not acting in accordance with the interests of the community or of users.

3. Alleged interference with core activities of community invoked (p. 10 of the Request)

The Requester furthermore maintains that the Expert was wrong in deciding that the delegation of the applied-for .LOTTO string would not interfere with core activities of the community invoked. The Requester claims that the reputation of the community represented stands to incur harm as the lack of a relationship between Afilias and the industry allegedly amounts to a likelihood of detriment for the community.

First of all, it is worth noting that ICANN's new gTLD policy does not require such relationship between the applicant for a new gTLD and a potentially related industry. As far as the requester cites ICC Expert Panel's Determination in case no. EXP/389/ICANN/6 regarding .BANK, the reasons for this Determination do not apply to the case at hand. As detailed by the Expert Panel, the banking sector is one of the most highly regulated sectors with a complex overlapping regulatory environment addressing banking services within a state as well as between states and involving several regulatory bodies in each state (cf. par. 160 et seq.). However, although a regulated market as well, the operation of lotteries can neither from the complexity of its regulation nor from its importance for consumers be compared to the banking sector. Thus, findings of the ICC Expert Panel in the .BANK case are of no relevance for the case at hand.

In addition, the Requester has not provided any evidence in the Objection or in the Request that online gaming services are core activities of his members. Rather, by way of example, the latest figures published by the German state lotteries associated in the Deutsche Lotto- und Totoblock ("**DLTB**") for 2013 show that online lottery services amount to significantly less than 5 % of the turnover of these state-owned operators. Thus, the Expert was right in deciding that the delegation of the applied-for string would not interfere with core activities of the community invoked by the Requester.

4. Alleged dependence of the community invoked on the DNS (p. 11 et seq. of the Request)

With regard to the dependence of the community invoked by the objector on the DNS for its core activities, the Requester complains that the Expert has wrongly required dependence on the applied-for string instead of the DNS (as required by the AGB). Apart from the fact that the Expert has cited such dependence on the *DNS* in the heading to the respective assessment in sec. 9.22 et seq. of the Determination, it is not clear why this would have an impact on the outcome of the objection procedure and thus constitute a violation of ICANN's policies.

In addition, the Requester complains that dependence of the community invoked cannot be proven before the actual operation of the applied-for string. However, as pointed out by the Expert and conceded by the Requester (cf. footnote no. 16 of the Request), the Objection lacked any explanation as to why the community invoked allegedly depends on the DNS for its core activities. In fact, as detailed in our Response to the Objection, this is not the case. State owned and State controlled lottery operators have a long tradition of offering their services via terrestrial and postal services, and online gaming services only amount to a rather small share of their business (e.g. less than 5 % of the turnover of German state-owned lottery operators, see above). Thus, the Expert was right to decide that the Requester did not produce any evidence in this regard.

As far as the Requester complains about the Expert's decision to deny the filing of additional submissions allegedly supporting his arguments for a dependence of the community invoked on the DNS,[1] the Expert was right in denying this request. The Requester had asked for such additional round of submission in order to "demonstrate its members' efforts to promote safe and responsible online lotteries" (see p. 2 of Requester's letter dated 4 July 2013, annex 6 to Request). As such efforts are of no relevance for the alleged dependence of the community invoked on the DNS, the Expert was right in denying an additional round of submissions in this regard as it would not assist in deciding the case.

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1 Confusingly, the Requester states at the same time that the community's dependence on the DNS for its core activities is supposedly "self-evident" (cf. footnote 16 of the Request). If this would be the case, there is no reason for the Requester to complain about not having been granted an additional round of submissions to explain such dependence.

5. Nature and extent of alleged damage to community invoked (p. 13 et seq. of the Request)

With regard to the nature and extent of alleged damage to the community invoked, the Requester challenges the Expert's findings insofar as the delegation of the applied-for gTLD would potentially cause trademark infringements. The Requester claims that the Expert has either not fully examined evidence produced by the Requester or erred in his judgment on potential trademark infringements.

However, by conceding that "the Panel is prepared to accept that there may be a risk of trademark infringements" (sec. 9.29 of the Determination), it is clear that the Expert has considered the Requester's arguments and evidence submitted in connection with such alleged infringements but has come to a different conclusion. In addition, the Requester seems to imply that mere registration of unlicensed operators under the applied-for string could lead to trademark infringements. This is not the case, as potential trademark infringements are independent of the question whether an operator of games of chance has been licensed under national public law to offer its services. Thus, the Expert was right in deciding that the Requester did not produce adequate evidence in this regard. Again, the mere fact that the Requester disagrees with the outcome of the Expert's Determination cannot render a Reconsideration Request successful.

As far as the Requester is concerned about unlicensed operators of games of chance allegedly taking advantage of the "implied trust associated with the regulated lotto business", the Expert was right to decide that this argument cannot prove a concrete or economic damage to the community represented as a result of the operation of the applied-for gTLD. As detailed in our Response to the Objection, such detriment claimed by the Requester would – if at all – take place irrespective of whether Afilias operates the applied-for gTLD, as unlicensed operators of games of chance are already active and offer their services online under the same gTLD as licensed operators.

6. Level of certainty of alleged detrimental outcomes (p. 14 of the Request)

With regard to the level of certainty that the detrimental outcome to the community invoked by the Requester would occur, the Requester complains that the Expert

has acknowledged an increased risk of illegal and even fraudulent activity but erred in his judgment that the Requester has not produced evidence for such risk.

Instead of inadequately, exaggeratedly and unprofessionally calling this "an error no reasonable person would make" (page 15 of the Request), it was perfectly reasonable for the Expert to refuse statements issued by the Requester's members about the alleged detrimental outcome as evidence for the Requester's arguments. Such statements are obviously influenced by the Requester's position in the objection procedure (and most likely also by misinterpreting the objection procedure as a means against unwanted competition for the Requester's members by "private" operators of games of chance). In addition, the mere fact that online gaming services might be associated with an increased risk of consumer harm (cf. p. 14 of the Request) does not mean that such risk is generated by the operation of the applied-for string. Rather, such risks have been identified and addressed by State regulatory bodies well before Afilias applied for the delegation of the .LOTTO string. Thus, the Expert was right to decide that the Requester has not produced adequate evidence to support his arguments.

7. Alleged violation of Art. 21(a) of the Procedure by delayed rendering of Determination (footnote no. 5)

As far as the Requester complains that contrary to art. 21(a) of the Procedure, the Determination has allegedly been rendered delayed, the Requester fails to give reasons why such delay would render the Determination wrong. The sole purpose of this request appears to be the disclosure of all information regarding the scrutiny phase, although it is not clear for what reason such disclosure should be necessary. However, even if the Determination had been rendered delayed, this would not justify cancellation of the Determination as the Objection still has been rejected with good cause.

In conclusion, the Expert has rightly decided that the Requester's Objection against the delegation of the .LOTTO string to Afilias does not meet all criteria for a community objection and was therefore to be rejected. As the Expert's Determination is therefore in full compliance with applicable ICANN policies, Afilias respectfully requests the Board Governance Committee to reject the Request and accept the Expert's Determination. For the same reasons, Afilias respectfully requests to deny the Requester's application for a reassessment of the case by another expert and an intermediate decision ordering or a hearing.

We are at your disposal should the Board Governance Committee need any further information from Afilias.

Yours sincerely,

Dirk Uwer