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Diegem, 20th January 2014

Subject: IDN ccTLD Implementation Plan and EPSRP, inconsistencies and concerns

Dear M. Crocker,

We are writing in reference to the revised IDN ccTLD Implementation Plan and the recently published guidelines for the Extended Process Similarity Review Panel (EPSRP).

Since the very beginning EURid, the .eu registry manager upon appointment of the European Commission, has been involved in the process of reviewing the IDN ccTLD Fast Track and has provided input to it.

The recently published guidelines for the Extended Process Similarity Review Panel (EPSRP) were not open to public comment and have raised our concerns on the approach to be followed when evaluating IDN ccTLD applications.

Therefore, we respectfully request the ICANN Board to examine the questions outlined in the final section of the attached paper and provide us with the necessary clarification and answers.

Yours Sincerely,

Marc Van Wesemael
EURid CEO

IDN ccTLD Implementation Plan and EPSRP: inconsistencies and concerns

Diegem, 20 January 2014

1. Summary

This paper is intended to highlight several inconsistencies in the handling of string confusability in the newly revised IDN ccTLD Fast Track process. The issues significantly impact applicants to the Extended Process Similarity Review Panel (EPSRP) and evaluators.

EURid requests that the ICANN Board provides clarification on the questions set out at paragraph 7 below, and that pending the Board response and/or any consequential clarification to the process documents, any time periods for application to the EPSRP be suspended.

1.1. Background

EURid, as the registry manager of the .eu top-level domain, has a keen interest in multilingualism and the promotion of IDNs. It offers support in all 24 official languages of the European Union, and sponsors the annual World Report on IDN Deployment in collaboration with UNESCO and Verisign.

In 2009, ICANN's country code Names Support Organisation (ccNSO) established a policy development process to enable applications for IDN ccTLDs, the so-called IDN ccTLD Fast Track process. By keeping the process "experimental" in nature[i], the ICANN community has allowed many IDN ccTLDs to become established, thus promoting online multilingualism while retaining the flexibility to respond to problems as they arise.

One such problem has been the issue of string confusability[ii]. Both the IDN ccTLD Fast Track process and the new gTLD programme include an evaluation of whether the applied for string "so nearly resembles another visually that it is likely to deceive or cause confusion" to the "average, reasonable Internet user"[iii]. Both require a probability, rather than a mere possibility, of confusion.

In 2011, following the ccNSO Council Resolution 61-02, a working group within the policy development process started to revisit the issue of string confusability in the IDN ccTLD Fast Track, ccNSO IDN PDP working group 1. In November 2013, ICANN published two documents, a Final Implementation Plan for IDN ccTLD Fast Track Process (the "Implementation Plan") and Guidelines for the Extended Process Similarity Review Panel (EPSRP) for the IDN ccTLD Fast Track Process (the "EPSRP Guidelines"), which revise the handling of string confusion in IDN ccTLD applications.

EURid closely monitored the working group's proceedings and gave input to all three public comment periods. As a matter of fact, it was EURid who recommended a more scientific approach to the confusing similarity aspect and shared the studies that they conducted in 2012 and 2013 concerning letter perception at the second and top-level for the .eu TLD.

While the revised documents include improvements, regrettably they also introduce inconsistencies (with one another and with the equivalent gTLD process). The inconsistency element is particularly relevant, as the end users are the same for

ccTLDs and gTLDs and therefore, it would be quite a paradox if different confusability criteria are applied to the ccTLD and gTLD environments.

This note sets out key areas in which clarification of the process documents is required in order to assure consistent policy outcomes in the public interest:

- The overall approach to string confusion is now inconsistent across new gTLDs and ccTLD IDNs.
    - Whereas the new gTLD evaluations on string similarity took a permissive approach, the ccTLD IDN Implementation Plan requires a conservative approach to be taken.
    - The same gateway issue (string confusion) will be evaluated by different panels using different methodologies and potentially different criteria. This will yield inconsistent results.
- The Implementation Plan gives inconsistent information as to whether or not the EPSRP evaluation will be final and binding. It is essential for would-be applicants to know with certainty whether or not the decisions of the EPSRP will be open to review.
- The Implementation Plan and EPSRP Guidelines give different standards for evaluating string confusion. It is unclear how, if at all, these standards interact, and which should take precedence in the event of a conflict.
- Wording created for the specific case of .εu (Greek script) appears to be excluded from the scope of the EPSRP consideration.
- On process, at the implementation stage the drafting of the EPSRP Guidelines has introduced substantive policy changes which were not consulted on at the ccNSO IDN PDP working group 1 or through any public comment period. EURid sent their feedback to ICANN on the EPSRP Guidelines on 13 November 2013. The accompanying email stated, "*We confide that the attached paper will help ICANN in addressing the existing concerns on the EPSR procedure*". The meeting held in Buenos Aires with ICANN, EURid and European Commission staff did not address any of the concerns expressed by the interested parties.

2. Inconsistency in overall approach across gTLDs and ccTLDs

2.1. Conservatism (ccTLDs) vs Permissiveness (gTLDs)

One of ICANN's core functions is policy coordination. A consistent approach towards string confusion across gTLD and ccTLD spaces is necessary to ensure the stable and secure operation of the Internet's unique identifier systems, and to prevent distortion of competition as between gTLDs and ccTLDs.

The new gTLD programme attracted more than 1900 applications, each of which went through a test for string confusion.

The results of the gTLD evaluations for string confusion show that a permissive approach was taken. Out of 1900 strings, only 2 non-identical strings were placed in contention sets (Unicom/unicorn; hoteis/hotels). No strings were failed for similarity with existing TLDs or reserved names. The evaluators for gTLD strings decided that singulars and plurals of the same words were not confusingly similar, for example car/cars, sport/sports, pet/pets, game/games.

The permissive approach towards string confusability in the new gTLD context has attracted controversy, and has given rise to numerous cases under the formal Objection phase of the new gTLD Programme (with conflicting results). In April

2013, the Governmental Advisory Committee advised the Board to *"reconsider its decision to allow singular and plural versions of the same strings"*. The Board, having considered the GAC advice and community feedback, confirmed the decisions of the evaluation panel, and resolved that *"no changes are needed to the existing mechanisms in the Applicant Guidebook to address potential consumer confusion resulting from allowing singular and plural versions of the same string."*

The Board decision indicates that it was satisfied with the execution of the string similarity evaluations, and saw no need to change the *"existing mechanisms in the Applicant Guidebook"*. This indicates that the test for string confusion is likely to continue unchanged in future gTLD application rounds.

The wording of the string confusion test in the gTLD Applicant Guidebook is identical to that in the ccTLD IDN Implementation Plan. In the absence of any other wording, the same permissive approach would apply in the IDN ccTLD context as well as new gTLDs. However, the ccTLD IDN Implementation Plan states:

> A **conservative approach** *for potential IDN ccTLD strings has been adopted because of the Fast Track Process' limited introductory nature and to safeguard against pre-empting the outcome of the ongoing IDN ccNSO Policy Development Process. Limitations in this module are focused on criteria and requirements set for the TLD string.*[iv] (emphasis added)

Independent evaluators can only rely on the Implementation Plan and EPSRP Guidelines to guide them on the intentions of the policy makers. The impact of adopting a conservative approach is illustrated in the outcome of the previous evaluation of the .ɛυ Greek script application:

> *"We therefore apply a very* **conservative standard** *in our assessment of applied-for strings that consist of two Greek, Cyrillic, or Latin characters, including a* **default presumption of confusability** *to which exceptions may be made in specific cases."*[v] (emphasis added).

The inconsistent overall approach across IDN ccTLDs and new gTLDs is yielding and will continue to yield inconsistent results on the same issue. It is likely to cause potential distortion of the competitive market.

2.2. Same issue, different panels, different criteria, different methodology

The methodology mandated for the EPSRP is different to that undertaken for new gTLD evaluations[vi]. The EPSRP requires a study to be undertaken by an *"external and independent research team"* to provide *"behavioural metrics derived from three different measuring methods (tests) to assess similarity…performed by multiple participants/volunteers".*

The necessity for a consistent approach on string confusability across the gTLD and ccTLD spaces was acknowledged within the policy development process. For example, the Chair of the ccNSO policy development process IDN Working Group stated that it would be *"a recipe for disaster"* to have different panels dealing with the same issue, because *"you could end up with a situation where a panel in the ccTLD process finds that something is confusingly similar but the different panel in the gTLD process finds there is not. At that's ludicrous"*[vii].

3. Will the EPSRP outcome be final and binding or not?

While the IDN ccTLD Fast Track PDP appears to have concluded, and the Implementation Plan is stated to be "Final", the preamble to Module 2 of the Implementation Plan states that the process is "*experimental in nature and should not pre-empt the outcome of the ongoing Policy Development Process.*" This suggests that the policy development process is still open, and that further revisions are expected.

The Implementation Plan at 4.1 states that "*the EPSRP evaluation may be requested by the requester to allow for a **final string similarity review***", and at 4.3 states that the EPSRP "*can be called upon to perform **a second and final confusing similarity assessment***".

The ICANN board resolution of 27 June 2013 states:

> "*As one of the purposes for the introduction of the IDN ccTLD Fast Track is to experiment with a methodology…thereby informing the ccNSO Policy Development Process…The introduction of the two-panel mechanism **as a test bed** within the Fast Track Process allows for **testing and refining, if needed, of the proposed two-panel mechanism and methodology**.*"
> (emphasis added)

The wording indicates that the process and methodology is still viewed as experimental and subject to change. This is prudent on the Board's part, as the methodology set out in the EPSRP Guidelines is experimental and untested in the context of the DNS[viii].

In that context, a final, non-appealable outcome would be inconsistent with the Board's instructions. It is also inconsistent with the Board resolution to have a stated deadline by which applications for the EPSRP are to be made.

Clarification on these points is essential to enable would-be applicants to decide whether or not to use the EPSRP, or to await the next iteration.

4. Inconsistent standards for string confusion within the ccTLD documents

The Implementation Plan and the EPSRP Guidelines set out inconsistent standards (ie criteria) for evaluating string confusion. Neither document references the standard from the other document, nor is it stated which standard for string confusion should take precedence in the event of a conflict. In other words, it is not clear which test for string confusion should be applied by the EPSRP evaluators.

The standard set out at paragraph 5.5 of the ccTLD IDN Implementation Plan is identical to the standard for string confusability in Module 2 of the gTLD Applicant Guidebook:

> *String confusion exists where a string so nearly resembles another visually 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.*

The EPSRP Guidelines make no reference to the Implementation Plan's standard for string confusion, and appear to set out a competing standard for string confusion[ix]:

> *The EPSRP procedure is based on the **proposed IDN ccTLD policy** and the rule for confusing similarity contained in this proposed policy. **The rule is** that if the appearance of the selected string, in upper or lower case, in common fonts in small sizes at typical screen resolutions, is sufficiently close to one or more other strings, it is probable that a reasonable Internet user who is **unfamiliar with the script** perceives the strings to be the same or confuses one for the other.* (emphasis added).

It is not clear what the "IDN ccTLD policy" is (the Implementation Plan, EPSRP Guidelines, another document?). The lack of reference to the Implementation Plan's standard, combined with the words "The rule is…" seems to give precedence to the EPSRP Guidelines standard.

The EPSRP Guidelines defines the "reasonable internet user" as being "unfamiliar with the script". In so doing, they introduce a new policy concept, which is absent from the standard set out in the Implementation Plan and the gTLD Applicant Guidebook. Working Group members and observers noted that the perception of users who are familiar with a script or language is likely to be different from that of users who are not familiar[x]. Furthermore, the same members and observers noted that the string to be evaluated will always be used in a broader context and very unlikely detached from a second level domain.

The standard for string confusion set out at 5.5 of the Implementation Plan appears to be excluded from the EPSRP's consideration, as the instruction at 4.3 refers exclusively to the EPSRP Guidelines: the "*EPSRP shall review the requested string(s) on the basis of the framework described in the 'Guidelines for the Extended Process Similarity Review Panel*". This gives the impression that the EPSRP Guidelines take precedence over the Implementation Plan.

Clarification is needed.

5. What is the status of wording created for the specific case of .eu ?

Following feedback from EURid and others on the application of the test for string confusion in the original IDN ccTLD Fast Track, in October 2011, the ccNSO Council adopted a resolution to cover situations where *"the requested IDN ccTLD string is **only** confusing with the two-letter [a-z] country code that is associated with the same territory."* The resolution included wording to cover the case where a ccTLD manager would commit to adopting additional measures to mitigate the risk of user confusion. In November 2011, the ICANN Board approved the resolution, and the wording is included at paragraph 5.6.3 (DNS Stability Evaluation) of the Implementation Plan.

Since early 2010, ICANN staff first highlighted potential string confusability issues between the existing ASCII TLD, .eu, and the Greek script .εu application. At the suggestion of ICANN staff, EURid made a number of commitments to mitigate the risk of user confusion, including homoglyph bundling, and a prohibition on mixed scripts. Therefore, the wording of the ccNSO Council Resolution was intended specifically for cases such as the .εu application.

Unfortunately, in the absence of express wording it is unclear how paragraph 5.6.3 of the Implementation Plan will be brought within scope of the EPSRP.

4.3 of the Implementation requires the EPSRP to "*review the requested string(s) on the basis of the framework described in the 'Guidelines for the Extended Process Similarity Review Panel' with a clear focus on the overarching principle to preserve and ensure the security, stability and interoperability of the DNS*". This takes the EPSRP exclusively to the EPSRP Guidelines, which do not include wording to reflect the Council resolution. The only extraneous factors which the EPSRP evaluators are allowed to consider is the security, stability and interoperability of the DNS.

Therefore, clarification is required to confirm that wording specifically crafted for situations such as the .εu application is within the scope of the EPSRP.

6. The policy development process

EURid is aware that the Board may feel unwilling to revisit the outcome of a bottom-up, multistakeholder policy development process. EURid is also aware that the policy development process was open and set up to enable inputs from any source. However, as the Board will know, an open process is not necessarily the same as a representative or rigorous process. Through no fault of those who did contribute their time and expertise to the process, or ICANN itself, this is an example of a PDP which has had very low levels of input. It is a situation where Board intervention is necessary, even required, to fulfill the Board's role of policy coordination, and support fair competition.

Although the Working Group as a whole had geographic and stakeholder balance, in reality the actual participation was low. From 2011 when the Sub-Working Group on string confusability was formed, the average number of Working Group members or observers (excluding ICANN staff) attending each call or meeting was 6, and the average number of speakers per meeting was 4. In one meeting, the number of WG speakers was 0.

Likewise, while there were 3 public comments covering the string confusability issue, a total of 14 comments were received, from a total of 9 contributors (with 4 contributing to more than one comment period). Some of the contributors to public comment also participated in Working Group discussions.

This is particularly relevant to the EPSRP methodology, which is experimental and has not been consulted on. It appears to offer no flexibility to evaluators and, worse, promises a level of certainty which is unlikely to be achievable, and for which we are unaware of any published academic research (ie the evaluation of non-Latin scripts in the DNS environment).

7. Requests to the Board

The issues highlighted in this paper are relevant to EURid as a potential EPSRP applicant, to the EPSRP evaluators and to the community as a whole in the ultimate interest of supporting online multilingualism. String confusability has proved a controversial issue both in the gTLD and IDN ccTLD context. The inconsistencies between the gTLD and ccTLD processes are unacceptable, and pose threats to the security and stability of the DNS. The internal inconsistencies and lack of clarity in the recently published documents, many of which may be resolved by a review of the drafting, will threaten the credibility of the process. The community resolved to review the IDN ccTLD process to give greater predictability of outcome on string

confusability issues. The current papers risk unpredictable outcomes, and appear to impose a level of inflexibility and finality which was not intended by the ICANN Board.

EURid respectfully requests the following:

- A suspension of any time limits set out in the Implementation Plan and EPSRP Guidelines for the filing of applications (eg the three month period for invoking the EPSRP).

- A full review of the Implementation Plan and EPSRP Guidelines to provide clarification on the issues highlighted in this paper.

- A written response to the numbered questions set out below.

EURid's questions to the ICANN Board:

1. Please confirm that the same overall approach, ie permissiveness on string confusability, should be applied in the IDN ccTLD context as has been applied in the new gTLD context, and that references to a "conservative approach" in the IDN ccTLD documents are in error.

2. Please state the reasons why having an evaluation of the same issue (string confusability) by a different evaluation panel and according to different criteria will preserve the security, stability and interoperability of the DNS, and will not distort competition as between applicants for new gTLDs and IDN ccTLDs.

3. Please confirm that given the "test bed" nature of the EPSRP (referenced in Board Resolution of June 2013), decisions taken under the EPSRP will not be final or binding on applicants.

4. Please confirm that having a fixed three-month time limit for applications to the EPSRP is inconsistent with the "test bed" nature of the EPSRP, and will be eliminated from the documents.

5. Please confirm that the same standard for string confusability applies across IDN ccTLD and new gTLD applications, namely

   String confusion exists where a string so nearly resembles another visually 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.

6. Please confirm that the equivalent evaluations for gTLD string confusability reviewed the issue from the standpoint of the "average, reasonable internet user who is **unfamiliar with the script**".

7. Please confirm that the EPSRP Guidelines are an implementation document, and in the case of conflict, the Implementation Plan should take precedence.

8. Please confirm that paragraph 5.6.3 of the Implementation is within scope of the EPSRP to consider in their evaluation, and if so, please make this expressly clear in the documents.

[i] See preamble to Module 2, Implementation Plan 5 November 2013, and ccNSO Council meeting minutes of 10 April 2013 paragraph 7, "the IDN ccTLD Fast Track Process was introduced at the time to, amongst others, experiment with the proposed methodology".

[ii] For example, see call for public comments: Fast Track Review, October 2010 http://www.icann.org/en/news/announcements/announcement-2-22oct10-en.htm , which states "some issues have arisen out of requested strings that are confusingly similar to existing strings and/or other requested strings".

[iii] See Implementation Plan 5.5, and Applicant Guidebook for new gTLDs at 2.2.1.1.2

[iv] Implementation Plan, Module 3 (TLD string criteria and requirements)

[v] DNS Stability Panel Report for EU 28 February 2012, p 2.

[vi] The gTLD string similarity evaluation published process document indicates that a different methodology was used compared with that proposed in the IDN ccTLD context, http://newgtlds.icann.org/en/program-status/evaluation-panels/geo-names-similarity-process-07jun13-en.pdf

[vii] IDN policy development process Working Group call, 28 February 2012, page 8

[viii] The EPSRP Guidelines refer to two recent academic publications. However, both papers reference only Latin-based scripts. Therefore the methodology is untested in the context of non-Latin scripts.

[ix] EPSRP Guidelines, "Methodology and Criteria", page 1

[x] See remarks of Manal Ismail and others in transcript of policy development process Working Group meeting of 15 March 2012: "The perception of someone who knows this script is different from someone who doesn't". This point appeared to be accepted by the ICANN staff lead, who promised to "update this one based on the comments from today". However, the wording remained unchanged.