

DETERMINATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 13-21

21 JANUARY 2014

The Requester seeks reconsideration of the Expert Determination, and ICANN's acceptance of that Determination, dismissing the Requester's community objection to the application for .LOTTO.

I. Brief Summary.

Afilias applied for .LOTTO. The Requester objected to Afilias' application, and lost. The Requester claims that the actions of the Expert Panel were inconsistent with ICANN policies, which influenced the Panel's decision to dismiss the Requester's Objection. Specifically, the Requester contends that the Panel incorrectly applied the six factors for evaluating the likelihood of material detriment element of a community objection.

The Requester asks ICANN to reverse the Expert Determination and either: uphold the Requester's Objection, reject Afilias' application for .LOTTO, and order the ICC to refund all costs to the Requester; or, alternatively, order the ICC to appoint a new panel to assess the likelihood of material detriment element of the Requester's Objection.

With respect to each claim asserted by the Requester, there is no evidence that the Panel misapplied any factor in evaluating the likelihood of material detriment. The Requester has failed to demonstrate that the Panel applied the wrong standard in contravention of established policy or procedure. Therefore, the BGC concludes that Request 13-21 be denied.

II. Facts.

A. Background Facts.

Afilias Limited (“Afilias”) applied for the .LOTTO string.

On 13 March 2013, the European State Lotteries and Toto Association (“Requester”) filed a Community Objection with the ICC¹ to Afilias’ application asserting that there is “substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.” (Applicant Guidebook (“Guidebook”), § 3.2.1; New gTLD Dispute Resolution Procedure (“Procedure”), Art. 2(e).)

On 13 May 2013, Afilias responded to the Requester’s Objection.

On 4 July 2013, the Requester sought leave from the Expert Panel to file an additional round of written submissions, which the Panel denied on 8 August 2013.

On 20 August 2013, the Panel submitted to the ICC an Expert Determination in favor of Afilias. Based on the submissions and evidence provided by the parties, the Panel determined that the Requester failed to prove that Afilias’ application “creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.” (Determination, Pg. 20, ¶ 10.1.4.) The Panel dismissed the Objection and deemed Afilias the prevailing party. (Determination, Pg. 21, ¶ 11.)

On 10 December 2013, the ICC notified the Requester of its Decision.

On 23 December 2013, the Requester filed Request 13-21.

¹ International Centre for Expertise of the International Chamber of Commerce.

B. The Requester's Claims.

The Requester claims that the Panel's decision regarding the requirement of detriment, and by extension, the decision to reject the Requester's Objection violates the following ICANN policies:

- Article 20(a) of the Procedure, which requires that the Panel "shall apply the standards that have been defined by ICANN";
- Section 3.5.4 of the Guidebook, in particular the standards for evaluating the likelihood of detriment;
- Article 1, Section 2.8 of ICANN's Bylaws, which requires that documented policies be applied neutrally and objectively, with integrity and fairness;
- Article II, Section 3 of ICANN's Bylaws, which state that ICANN shall not apply its standards, policies, procedures and practices inequitably or by singling out any particular party for disparate treatment unless justified by substantial and reasonable cause; and
- Article 4 of ICANN's Articles of Incorporation, which requires, among other things, that ICANN carries out its activities in conformity with relevant principles of international law.

(Request, Section 8.C., Pgs. 6-7.) Specifically, the Requester contends that the Panel incorrectly applied the six factors for evaluating the likelihood of material detriment by:

1. For the first factor, requiring proof of actual harm in evaluating the nature and extent of damage to the reputation of the community represented by the Requester that would result from Afilias' operation of the .LOTTO string;
2. For the second factor, requiring proof that Afilias' policies are insufficient to prevent the risks identified by the Requester;
3. For the third factor, ignoring evidence that Afilias' operation of the .LOTTO string would interfere with the core activities of the community the Requester represents;
4. For the fourth factor, requiring the Requester to demonstrate dependence on the .LOTTO string and rejecting the Requester's request to address to specific allegations in Afilias' response to the Requester's Objection;
5. For the fifth factor, ignoring evidence of potential trademark infringement and requiring proof of actual harm in evaluating the nature and extent of concrete

or economic damage to the community represented by the Requester that would result from Afilias' operation of the .LOTTO string; and

6. For the sixth factor, ignoring evidence of increased risk of consumer harm that would result from Afilias' operation of the .LOTTO string.

(Request, Section 8.C., Pgs. 6-15.)

C. Relief Requested.

The Requester asks that ICANN reverse the Expert Determination dismissing the Objection (including, specifically the Panel's findings on detriment). The Requester also asks that either: ICANN order that the Requester's Objection be upheld, that Afilias' application for .LOTTO be rejected, and that the Requester's advance payment of costs be refunded by the ICC; or alternatively, that ICANN order the ICC to appoint a new expert to evaluate whether the Requester's Objection satisfied the likelihood of detriment element.

The Requester further asks ICANN to issue an intermediate decision ordering, on the basis of the openness and transparency requirement in ICANN's Bylaws, the ICC to disclose the draft Expert Determination that the Panel submitted to the ICC on 20 August 2013, as well as any and all correspondence and documents, including but not limited to the correspondence and documents regarding the "scrutiny phase of th[e] draft decision, leading up the final decision of 9 December 2013."²

Finally, the Requester asks that, in the event the BGC considers denying the Request, the BGC order a hearing, by video-conference or otherwise. (Request, Section 9, Pgs. 15-16.)³

² In setting forth the background facts in the Request, the Requester raised concerns regarding the timeliness of the Expert Determination and the ICC's "scrutiny as to form" review of the Expert Determination submitted to the ICC on 20 August 2013. (Request, Section 8.A., Pgs. 5 fn. 5.) The Requester has asked for specific relief relating to these concerns, but has not asserted these concerns/issues as grounds for reconsideration.

³ 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

III. Issues.

In view of the claims set forth in Request 13-21, the issue for reconsideration is whether the Panel applied the wrong standard in contravention of established policy or process.

Specifically, the issue is whether the Panel incorrectly applied the six factors for evaluating the likelihood of material detriment as reflected in Section I.B. above.

IV. The Relevant Standards for Evaluating Reconsideration Requests and Community Objections.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.⁴ (Bylaws, Art. IV, § 2.) Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes that the requesting party failed to satisfy the reconsideration criteria set forth in the Bylaws. ICANN has previously determined that the reconsideration process can properly be invoked for challenges to expert determinations rendered by panels formed by third party dispute resolution service providers, such as the ICC, where it can be stated that the Panel failed to follow the established policies or processes in reaching the expert determination, or that staff failed to follow its policies or

(continued...)

before it for a hearing. *See* Reconsideration Request Form at <http://www.icann.org/en/groups/board/governance/reconsideration/request-form-11apr13-en.doc>.

⁴ Article IV, Section 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
- (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

processes in accepting that determination.⁵

In the context of the New gTLD Program, as the Requester acknowledges in the Request, the reconsideration process does not call for the BGC to perform a substantive review of expert determinations. Accordingly, the BGC is not to evaluate the Panel's substantive conclusion that the Requester failed to establish that Afiliás' application for .LOTTO creates a likelihood of material detriment to the rights of a significant portion of the targeted community. Rather, the BGC's review is limited to whether the Panel violated any established policy or process, which the Requester suggests was accomplished when the Panel incorrectly applied the standard for evaluating the likelihood of material detriment. (Request, Section 8, Pg. 6.)

The standards for evaluating community objections include a four-part test to help an expert panel determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

(Guidebook, Section 3.5.4.) Section 3.5.4 also includes a list of factors that could be used to evaluate each of the four criteria. (*See Id.*) The factors relevant to the Requester's claims are discussed in detail below.

⁵ See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>, BGC Recommendation on Reconsideration Request 13-5.

V. Analysis and Rationale.

A. Requester Failed To Demonstrate That The Panel Applied The Wrong Standards In Contravention Of Established Policy or Process.

The Requester contends that the Panel applied the wrong standard for evaluating the likelihood of material detriment. Specifically, the Requester claims that “in assessing the factors relevant for the assessment of a likelihood of material detriment, the Expert has erroneously required proof of actual harm and that he has committed other policy violations.” (Request, Section 8, Pg. 8.)

As noted above, to prevail on a community objection, the Requester must establish, among other things, that the “application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.” (Guidebook, Section 3.5.4.) The Guidebook (as the Panel correctly notes) includes a list of six factors that could be used by a panel in making this determination. (*Id.*; *see also* Determination, Pg. 15, ¶ 9.2.) The factors include but are not limited to the following:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant’s operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant’s operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant’s operation of the applied-for gTLD string; and

- Level of certainty that alleged detrimental outcomes would occur.

(Guidebook, Section 3.5.4.)

The six factors serve only as guidance for the Panel; the Panel is not required to use these factors in its evaluation of the likelihood of material detriment. The Requester bases its entire Request on the purported misapplication of these discretionary factors. As discussed in detail below, there is no support for Requester's contention that the Panel incorrectly applied any of these factors in contravention of established policy or process.

1. The Panel did not Incorrectly Require Proof of Actual Harm In Applying the First Factor.

The Requester claims that in applying the first factor – the “[n]ature and extent of damages to the reputation of the community represented by the objector that would result from the applicant’s operation of the applied-for gTLD string” – the Panel incorrectly required proof of actual harm resulting from the operation of .LOTTO. (Request, Section 8.C., Pg. 9.) To support this assertion, the Requester relies on the following Panel statement:

Having considered both parties’ submissions the Panel is convinced by the Applicant’s case and finds that the Objector has failed to establish damage to the reputation of the community represented by the Objector resulting from the Applicant’s operation of the applied-for gTLD string.

(Determination, Pg. 16, ¶ 9.10.)

According to the Expert Determination, in addressing the nature and extent of damage to the reputation of the community represented by the Requester, the Requester asserted that unlicensed operators would:

[I]llegitimately ride on the coat tails of the carefully developed reputation of State lotteries, the general availability of .LOTTO domain names would confer upon illegal operators the advantage of associating their website with State licensed lotteries which would damage the interests of unsuspecting consumers which would be detrimental to both licensed operators and internet users.

(Determination, Pg. 16, ¶ 9.5.) In response, Afilias asserted that the Requester “failed to prove that the delegation of the .LOTTO string would cause significant damage to the reputation of the community represented by the Objector.” (Determination, Pg. 16, ¶ 9.6 (emphasis added).) Afilias claimed the risk of damage alleged by the Requester exists with any gTLD, and that the “mere rejection” of .LOTTO would not avoid or reduce the risk of unlicensed or criminal operators within the gambling industry. (*Id.*) Afilias further claimed that the prevention of such activity is a regulatory matter that is outside the scope of ICANN’s objection process. (*Id.*)

Based on the parties’ contentions, it is clear that the Panel was not requiring proof of “actual injury” in applying this factor. The Expert Determination reveals that the Panel simply agreed with Afilias that the Requester failed to establish the nature and extent of the alleged damage to the reputation of the community represented by the Requester, which is precisely what the factor calls for. The Requester is required to prove that Afilias’ application creates a likelihood of material detriment, not just detriment. Accordingly, there is no evidence that the Panel’s action contradict any established policy or process.

2. The Panel did not Incorrectly Require Proof that Afilias’ Policies are Insufficient to Prevent the Alleged Risks In Applying the Second Factor.

The Requester claims that, in applying the second factor, the Panel incorrectly required proof that Afilias’ registry policies are insufficient to prevent the risks identified by the Requester. (Request, Section 8.C., Pgs. 9-10.) To support this assertion, the Requester relies on the following Panel statement:

Having considered the parties’ submissions the Panel comes to the view that although as pointed out by the Objector there are risks of increased illegal or fraudulent activity these would not necessarily be prevented by the mere fact that the members of the Objector are State owned or State controlled operators. The problems raised might well be prevented by the anti-abuse policy of the Applicant. In particular the Panel takes into account the Applicant’s submission and finds

that the Objector has not provided any evidence that the registry policies of the Applicant are insufficient to prevent malicious use of the applied-for gTLD.

(Determination, Pg. 18, ¶ 9.17 (emphasis added).) The Requester contends that such evidence is impossible to provide since the policies have not yet been put into practice. (Request, Section 8.C., Pgs. 9-10.)

According to the Expert Determination, the Requester noted that Afilias' application is for an open gTLD and claimed that the application provides "no safeguards whatsoever" that .LOTTO will only be used by licensed operators. (Determination, Pg. 17, ¶ 9.11.) The Panel noted Afilias' response to the Requester's claims:

In contrast, the Applicant proposes extensive state of the art security measures to prevent illegal, malicious or fraudulent use of the applied-for gTLD. It refers to the anti-abuse policy set out at section 28 of the Application (Annex 3 to the Objection). Moreover, it submits that the proposed registry policies further ensure a well regulated registration process to prevent unqualified or incomplete registrations and to protect the rights of third parties.

(Determination, Pg. 18, ¶ 9.14.)

In summary, the Requester claimed that Afilias' application provides "no safeguards whatsoever" and Afilias responded by claiming its application includes, among other things, "state of the art security measures." (Determination, Pg. 17, ¶ 9.11; Pg. 18, ¶ 9.14.) As noted above, the plain language of the second factor requires "evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests." (Guidebook, Section 3.5.4 (emphasis added).) It is therefore not enough that the Requester claimed there are no safeguards. The Requester would also need to demonstrate how the security measures proposed by Afilias are ineffective or insufficient to prevent the risks identified by the Requester. The Requester failed to do so. As such, the Panel's determination of the second factor does not appear inconsistent with the standards set forth in the Guidebook.

3. The Panel did not Incorrectly Ignore Evidence In Applying the Third Factor.

The Requester contends that, in applying the third factor – “[i]nterference with the core activities of the community that would result from the applicant’s operation of the applied-for gTLD string” – the Panel incorrectly ignored evidence that Afiliias’ operation of .LOTTO would interfere with the core activities of the community the Requester represents. (Request, Section 8.C., Pgs. 10-11.) To support this assertion, the Requester relies on the following Panel statement:

In the Panel’s view there is no evidence before it that the delegation of the applied-for gTLD to the Applicant would justifiably interfere with the core activities of the community as referred to by the Objector. Accordingly the Objector has failed to prove such interference.

(Determination, Pg. 18, ¶ 9.21.) The Requester claims that it “disagrees” with the Panel’s finding in that the Requester has “clearly shown that the reputation of the community it represents stands to incur harm.” (Request, Section 8.C., Pg. 10.)

Based on the Request and the Expert Determination, the Panel did not find any evidence of how the proposed string may interfere with the core activities of the community as called for by the third factor. According to the Expert Determination, the Requester did not even articulate an interference, but instead, made similar claims regarding the potential detriments to both licensed operators and internet users resulting from the general availability of .LOTTO.

(Determination, Pg. 18, ¶ 9.19.) Afiliias, on the other hand, expressly denied that the delegation of .LOTTO would interfere with the core activities of the community invoked by the Requester.

(Determination, Pg. 18, ¶ 9.20.) Afiliias also claimed:

Online communication is not a core activity of State owned or controlled operators of games of chance; most members of the Objector have a long tradition of offering games of chance outside the internet as they have been established long before the appearance of online business models.

(Id.)

The argument asserted by the Requester is likewise deficient in that the “evidence” the Panel purportedly ignored has nothing to do with an alleged interference. The Requester asserts in the Request that the “lack of any relationship between Afiliias and [state-operated lottery] industry in itself amount to a likelihood of detriment” and that the Panel’s finding is “manifestly inconsistent with the findings that the public associates ‘LOTTO’ to licensed or state-operated lotteries and that there is a risk of increased illegal and fraudulent offerings.” (Request, Section 8.C., Pgs. 10-11.) The Requester makes no reference to evidence demonstrating an interference with the core activities of the community the Requester represents.

While the Requester may disagree with the Panel’s conclusion on the third factor, the Requester’s disagreement is not a proper basis for reconsideration.

4. The Panel did not Incorrectly Require the Requester to Demonstrate Dependence on the .LOTTO String in Applying the Fourth Factor.

The Requester claims that, in applying the fourth factor – the “[d]ependence of the community represented by the objector on the DNS for its core activities” – the Panel incorrectly required the Requester to demonstrate dependence on .LOTTO instead of the DNS. (Request, Section 8.C., Pgs. 11-12.) To support this assertion, the Requester relies on the following statements by the Panel:

The Applicant submits that the community invoked by the Objector ie. the State licensed operators does not depend on the .LOTTO string for its core activities. The Objector has failed to prove that the community members need online communication in order to conduct their business model. It points out that most State owned or controlled lotteries have a long tradition of offering games via phone or mail or international sales agencies insofar as they offer their products and services online they have established websites registered under different TLD’s. There is no evidence that consumers wanting to participate in their games of chance had difficulty finding their websites in order to do so.

There is no evidence to the contrary adduced by the Objector and the Panel finds that the Objector has not succeeded in proving such dependence.

(Determination, Pg. 19, ¶¶ 9.23-9.24.) The Requester contends that it cannot demonstrate reliance on a gTLD that has not been delegated. (Request, Section 8.C., Pgs. 11-12.)

According to the Expert Determination, the Requester did “not specifically address this issue.” (Determination, Pg. 19, ¶ 9.22.) The Requester contends in its Request that it did not “expressly state[] its members depend on the DNS since this is self-evident: lotteries conduct their business in communication with consumers.” (Request, Section 8.C., Pg. 12 fn 16.) The Requester claims that it did “emphasize its efforts to promote safe and responsible gaming online which necessarily implies dependence on the internet.” (*Id.*)

The community member’s dependence on the DNS, however, does not appear to be self-evident. As noted above, in addressing the third factor, Afilias asserted that online communication is not a core activity of the Requester’s community. (Determination, Pg. 18, ¶ 9.20.) In addressing the fourth factor, Afilias further asserted that the Requester failed to demonstrate that the community members “need” online communication in order to conduct their business model. (Determination, Pg. 19, ¶ 9.23.) No contrary evidence was presented by the Requester. Accordingly, the Panel concluded that the Requester, which bears the ultimate burden in the objection process, did not succeed in demonstrating dependence on the DNS. (Determination, Pg. 19, ¶ 9.24.) As such, there is no evidence that the Panel’s actions were inconsistent with the standards for evaluating the likelihood of material detriment.

The Requester further claims that the Panel improperly rejected the Requester’s request to reply to specific allegations in Afilias’ response to the Requester’s Objection – notably, the claim that the Requester failed to prove that community members need online communications to conduct their business model. (Request, Section 8.C., Pg. 12.) As the Requester properly

noted in the Request, the Panel has complete discretion on whether to allow the parties to submit additional written submissions. (Request, Section 8.C., Pg. 12 fn 17; *see also* Procedure, Art. 17(a).) The fact that the Panel decided not to accept additional submissions does not mean that the Panel violated any policy or process. Because there is no automatic right to submit a reply, the Requester, having the burden of proof, should have included all material facts in the Objection. The Panel should not be faulted for the Requester's failure to do so.

5. The Panel did not Incorrectly Ignore Evidence and Require Proof of Actual Harm in Applying the Fifth Factor.

The Requester claims that, in applying the fifth factor – the “[n]ature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant’s operation of the applied-for gTLD string” – the Panel incorrectly ignored evidence of potential trademark infringement and required proof of actual harm rather than a likelihood of material detriment. (Request, Section 8.C., Pgs. 13-14.) To support this assertion, the Requester relies on the following statements from the Panel:

The Panel is prepared to accept that there may be a risk of trademark infringement but in the absence of any specific evidence from the Objector it is not in a position to consider this further. The Panel regards trademark infringement as a factor that might establish “*concrete or economic damage to the community represented by the Objector.*” However in the absence of specific evidence from the Objector the Panel is unable to make any conclusion in that regard. ...

The Panel finds that the Objector has failed to demonstrate concrete or economic damage to the community represented by the Objector as a result of the Applicant’s operation of the applied-for gTLD string.

(Determination, Pgs. 19-20, ¶¶ 9.29 (emphasis in original) & 9.31.) The Requester contends that it submitted over 20 trademark registrations comprising the term “LOTTO” that are held by its members, and that Afiliás has clearly indicated in its application that it will “allow unlicensed operators to register domains in the applied-for gTLD string.” (Request, Section 8.C., Pg. 13.) The Requester claims that the Expert has either not fully examined the record, or has “erred in

his judgment” on the issue of trademark infringement. (*Id.*)

According to the Expert Determination, the Requester asserted that:

[T]here is a significant risk that unlicensed and fraudulent businesses will use the .LOTTO extension to associate in the eye of unsuspecting internet users, their business to the legal safeguards provided by the government operated or government licensed lotteries. Delegation of .LOTTO as an open TLD would cause harm to the community and more importantly to internet users.

(Determination, Pg. 19, ¶ 9.25.) In response, Afiliis claimed that “community members have many possibilities to distinguish themselves from other operations by means of competition and promotion” and that the Requester failed to provide any evidence that “the use of the gTLD can lead to a consumer confusing different operators.” (Determination, Pg. 19, ¶ 9.27.) Afiliis further claimed that whether the proposed .LOTTO will amount to infringement of the Requester’s member’s trademark rights is an issue more properly addressed in a legal rights objection and is not relevant to the issued raised in a community objection. (Determination, Pg. 19, ¶ 9.28.) Afiliis also claimed that its registry policies “effectively prevent infringement of existing trademarks.” (Determination, Pg. 19, ¶ 9.30.)

Based on the parties’ contentions, the Panel noted that, although there may be a risk of trademark infringement that “might” establish economic damage to the community represented by the Requester, the Requester has not provided evidence to allow the Panel to make that determination. (Determination, Pg. 19, ¶ 9.29.) The Requester’s submission of over 20 trademark registrations comprising the term “LOTTO” did not seem to assist the Panel in this inquiry – *i.e.*, the Requester did not provide specific evidence that these trademark registrations are likely to be infringed. Moreover, the Panel is not requiring “actual injury” here as argued by the Requester. Rather, the Panel appears to be attempting to determine the nature and extent of concrete or economic damage as called for by the factor. The Requester’s concern that unlicensed and fraudulent businesses will use the .LOTTO extension and cause harm to

community and internet users did not rise to the level of concrete or economic damage in the view of the Panel. The BGC will not second guess the Panel’s judgment in this regard.

6. The Panel did not Incorrectly Ignore Evidence in Applying the Sixth Factor.

The Requester claims that, in applying the sixth and final factor – the “[l]evel of certainty that alleged detrimental outcomes would occur” – the Panel incorrectly ignored evidence of increased risk of consumer harm that would result from Afiliias’ operation of the .LOTTO string. (Request, Section 8.C., Pgs. 14-15.) To support this assertion, the Requester relies on the following statements by the Panel:

The Objector submits that there is significant risk. It does not however produce evidence to support that submission.

It follows that the Objector has failed to prove a sufficient level of certainty for the alleged detriment.

(Determination, Pg. 20, ¶¶ 9.35-9.36.)

The Requester contends that the Panel’s finding is “simply incorrect” and cannot be reconciled against the evidence produced by the Requester.⁶ Specifically, the Requester claims that it submitted the following documentation: (i) over 50 declarations of its members that websites in the .LOTTO space “would be perceived by consumers as state-operated, licensed or at least regulated and the delegation of the gTLD would lead to consumer confusion”; (ii) an extensive report by European Parliament on online gambling in the “Internal Market”; and (iii) caselaw from the European Court of Justice acknowledging and proving that “there is an

⁶ The Requester also contends that the Panel’s finding stands in stark contrast to the expert panel’s finding in .BANK, which found that the applicant’s “admitted lack of any relationships and familiarity with banking or the global community raises the level of certainty with respect to the likelihood of these injuries materializing to a high level, far too high to sustain the Application.” (Request, Section 8.C., Pg. 14 fn 20; Annex 12 at ¶ 166.) As noted previously, the fact that another expert panel may have come to a different conclusion (based on a different set of evidence) does not mean that this Panel violated an established policy or process.

increased risk of consumer harm from online gambling.” (Request, Section 8.C., Pg. 14.) The Requester contends that either the Panel did not examine the record or chose to ignore the evidence submitted. (Request, Section 8.C., Pg. 15.)

According to the Expert Determination, in addressing the level of certainty that alleged detrimental outcomes would occur, the Requester again asserted that there is there is “significant risk” that unlicensed and fraudulent businesses will use the .LOTTO extension and cause harm to the community and internet users. (Determination, Pg. 20, ¶ 9.32.) Afilias countered that the Requester “failed to prove a sufficient level or degree of certainty for the alleged detriment” and submits that the presence of unlicensed or criminal business models in the gambling industry already exists online and can never be excluded. (Determination, Pg. 20, ¶¶ 9.30-9.31.)

Based on the parties’ contentions, the Panel concluded that the Requester failed to prove a sufficient level of certainty for the alleged detriment. (Determination, Pg. 20, ¶ 9.36.) The Panel was not persuaded by the Requester’s evidence on this issue, determining that it did not support the significant risks asserted by the Requester. (Determination, Pg. 20, ¶ 9.37.)

The Requester has not been able to establish an actual policy or process that the Panel failed to follow – instead, the Request challenges the Panel’s substantive determination. While the Requester may disagree with the Panel’s finding, reconsideration is not a mechanism to re-try the substantive determination of the Panel. The Requester’s claim that the Panel incorrectly ignored evidence in applying the sixth factor is unsupported and does not support reconsideration.

VI. Decision

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies European Lotteries’ Reconsideration Request (including European Lotteries’ request for a hearing, as well as European Lotteries’ request for an intermediate decision ordering the disclosure of additional documentation from the ICC). As

there is no indication that either the Panel or ICANN violated any policy or process in reaching or accepting the Determination, this Request should not proceed. If the Requester believes that it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.

In accordance with Article IV, Section 2.15 of the Bylaws, the BGC's determination on Request 13-21 shall be final and does not require Board consideration. The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that the BGC's determination on such matters is final. (Bylaws, Art. IV, § 2.15.) As discussed above, Request 13-21 seeks reconsideration of a staff action or inaction. After consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board (or NGPC) is warranted.