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By Email ([reconsideration@icann.org](mailto:reconsideration@icann.org))

ICANN Board

Internet Corporation for Assigned Names and Numbers  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536

Dear Members of the Board,

**Re: BGC Recommendation in Reconsideration Request 15-7**

Reference is made to Request for Reconsideration 13-7 filed on behalf of my clients Booking.com and Travel Reservations on 13 May 2015 and to the recommendation of the BGC of 20 June 2015.

The Board is neither bound by, nor required to give any deference to, the BGC's recommendation. For the reasons set out further below, I respectfully reiterate my clients' request to be heard with a view to reversing the decision by which '.hotels' (Application ID 1-1016-75482) and '.hoteis' (Application ID 1-1249-87712) were put in a non-exact match contention set and to allow both applications to proceed.

Since Booking.com first challenged the ICANN Board decision to put .hotels and .hoteis in a contention set, ICANN – and the BGC – has maintained the position 1) that the fact the process established by ICANN was followed is sufficient reason to reject that challenge and, 2) that the fact that the process allowed neither for Booking.com to be heard nor for a review of the decision by the ICANN Board is of no relevance.

In the interim, IRP Panels have confirmed that this process-focused position is unsustainable. The ICANN Board has an overriding responsibility for making fair, reasoned and non-discriminatory decisions under conditions of full transparency. As a result, in reviewing concerns raised by affected parties, the ICANN Board is bound to conduct adequate diligence to ensure that ICANN is applying its procedures fairly (*See* the Final Declaration in ICDR Case No. 50 117 T 1083 13, §§94-98).

Simply following the processes and procedures developed by ICANN cannot alone be sufficient grounds for declining to review a decision. If the requirements of fairness, reasoned decision making, non-discrimination and transparency have not been met in the implementation of the process and procedures, the ICANN Board must, when invited to do so, conduct a meaningful review (*See* the Final Declaration in ICDR Case No. 50 117 T 1083 13, §107). The ICANN Board is obliged to intervene and correct flawed processes that are unfair, non-transparent or discriminatory (*See e.g.* the Final Declaration in ICDR Case No. 50 117 T 1083 13, §§105-109). The ICANN Board cannot rely on advice for which no rationale was provided and the ICANN Board must give those parties most affected the opportunity to make their position known and defend their interests (*See* the Final Declaration in ICDR Case No. 50 117 T 1083 13, §109).

The ICANN Board must review whether the actions and advice of ICANN constituent bodies, staff or third parties commissioned by ICANN have acted in compliance with ICANN's governing principles. In the context of that review, the ICANN Board must also apply those governing principles. These principles bar the ICANN Board from adopting a purely process-oriented approach. If a process (or its implementation) violates the governing principles, the ICANN Board must adapt or abandon that process.

Following the Final Declaration in the *Booking.com* case (ICDR Case No. 50-20-1400-0247), the ICANN Board acknowledged that the string similarity review process was unfair and non-transparent and accepted to adapt the process for future rounds. As we already mentioned, we welcome this decision as it is consistent with your commitment to improve ICANN's accountability.

Further, as recently confirmed, the ICANN Board's margin of appreciation in considering the outcome of an IRP is limited as a declaration of an IRP Panel is binding, regardless of the terminology that is used by the Panel ('decision', 'opinion' or 'recommendation') (*See* the Final Declaration in ICDR Case No. 50 117 T 1083 13, §23, §§130-133).

Despite this, in its decision of 26 April 2015 with respect to the current round and the applications for .hotels and .hoteis, the ICANN Board disregarded the IRP Panel's recommendation, *i.e.*, to consider whether approval of both the .hotels and .hoteis proposed strings would be in the best interest of the Internet community. In its recommendation of 20 June 2015, the BGC endorses the decision of 26 April 2015, which disregards the IRP Panel's recommendation.

The BGC's recommendation is therefore untenable on two grounds. First, it fails to acknowledge the binding nature of the IRP recommendation.

Second, it maintains the unfair, discriminatory and non-transparent treatment of Booking.com's and Travel Reservations' applications and does so without a proper statement of reasons.

Booking.com and Travel Reservations are suffering discrimination not only vis-à-vis other applicants in the current round, but also vis-à-vis gTLD applicants in future rounds. Indeed,

the ICANN Board will further discriminate against Booking.com and Travel Reservations – vis-à-vis parties in other IRPs where Panel declarations are acted upon – if it does not exercise its discretionary powers to review the string similarity review diligently in light of its governing principles.

It follows that the only way to respond to the Panel's recommendation in the *Booking.com* case with respect to the applications for .hotels and .hoteis is to review the decision to put the gTLD strings in a contention set.

Further, the only proper outcome of such a review – given the the arguments and expert advice previously submitted to the Board on behalf of my clients – is to allow both gTLD applications to proceed in the application process.

This would have no adverse effects on ICANN, the ICANN Community or any third party:

- The only parties concerned by the underlying issue are Booking.com and Travel Reservations SRL and they see no reason for .hotels and .hoteis not to co-exist.
- Various ICANN Board members have openly declared that they find the process unfair and they do see no reason why .hotels and .hoteis should not co-exist.
- There is a reasoned experts report stating that there is no reason why .hotels and .hoteis should not co-exist and demonstrating that the advice (which was not reasoned) on which the string contention set decision was based is simply wrong.

Given the way ICANN is organized and operates today, the ICANN Board is the only body that can resolve this situation. I am aware that I have raised many of these concerns with the ICANN Board before. Nonetheless, in light of the most recent IRP Declarations, I feel compelled to bring them to the ICANN Board's attention again. I simply do not understand how maintaining the decision is in the interest of ICANN, the Internet user and the ICANN Community. Not least, it seems to me that the approach adopted by ICANN to date has imposed, and continues to impose, considerable costs on both ICANN and the parties. For these reasons, I repeat my request that the ICANN Board intervene to remedy this situation.

You will understand that, if you decide to follow the BGC Recommendation, my clients reserve the right to take further action.

Sincerely yours,



Flip Petillion