



April 21, 2015

VIA EMAIL (ombudsman@icann.org)

Mr. Chris LaHatte
Ombudsman
ICANN

Re: Board Governance Committee Review of and Action Upon
Amazon EU S.à.r.l. Request for Reconsideration No. 14-27

Dear Mr. LaHatte:

We appreciate the opportunity to review and comment on your March 27 draft report regarding the complaint by Amazon EU S.à.r.l. (“Amazon”) that the ICANN Board Governance Committee (“BGC”) unfairly treated Amazon’s Reconsideration Request 14-27 (the “Reconsideration Request”). Our February 25, 2015 letter to you detailed why we believe we’ve been treated unfairly, namely, that the only Board members reviewing Board decisions on new gTLD applications are the very Board members who made the decisions in the first place. We contend that this process was fundamentally and inherently unfair, and precluded any meaningful and objective review of our Reconsideration Request. For the reasons set out below, we respectfully disagree with the result you recommended in the draft report. Although we object to your conclusions, we highlight below the three primary points of difference.

First, we disagree with your apparent contention that all new gTLD applicants waived any and all conflicts relating to their use of ICANN accountability mechanisms because they filed their new gTLD applications with knowledge (actual or presumed) of the existence of those accountability mechanisms. The conflict we have raised – that the only Board members reviewing Board decisions on new gTLD applications are the very Board members who made the decisions in the first place – was not disclosed and was not reasonably foreseeable.

Second, we are confused by your discussion about the formation of the New gTLD Program Committee (“NGPC”). In your January email to our counsel and during our February meeting in Singapore, you had taken the position that Amazon had advance notice of this inherently unfair process when it filed its .AMAZON Applications because the NGPC had already been formed. Our February 25 letter to you noted that (i) the January 2012 Applicant Guidebook did not mention that Requests for Reconsideration of Board action would be reviewed by the same ICANN Board members (as BGC members) that made the decision (as NGPC members) that is the subject of the Request for Reconsideration, or that final action on those Requests for Reconsideration would be made by the same ICANN Board members (once again as NGPC members); and (ii) the ICANN Board had not publicly announced this process when Amazon filed its .AMAZON Applications. This demonstrates that Amazon could not have consented to a process that did not even exist when we filed our .AMAZON Applications and did not waive this inherent conflict of interest by filing our .AMAZON Applications.

Now, however, your draft report appears to suggest that we (along with every other new gTLD applicant) did consent to the conflict because the Board’s creation of the NGPC after we filed our .AMAZON Applications “was an entirely predictable and appropriate use of the board’s resources.” Respectfully, whether the creation of subcommittees of the Board was predictable is beside the point. As we have

noted, the conflict here existed because there was no independent review of that subcommittee's decision on the .AMAZON Applications – the same Board members who made the original decision then reviewed that decision. If you maintain that this conflict was “entirely predictable,” we request that your final report clarify what facts or historical precedent would lead applicants to expect such conflicts would permeate review of decisions on their applications.

Third, contrary to your draft report, we specifically raised the conflict of interest in connection with our Request for Reconsideration. Our counsel's June 3, 2014 letter to the BGC:


- Asked how the BGC intended to address the review of Amazon's Request for Reconsideration given that “BGC members are now asked to review and consider a decision in which the majority of BGC members were involved and with which they agreed”;
- Noted that “One BGC member (who is currently a non-voting member of the BGC) may have a conflict as his company is the backend registry provider of record for three of Amazon's applications . . . This leaves only one member of the BGC without apparent relationship to the parties involved or prior involvement in the matter”;
- Asked how the BGC “will make a recommendation on the merits of the Request for Reconsideration. Will this recommendation be addressed to the full Board of Directors, the Board of Directors without the NGPC members (who took part in the decision), or will the NGPC be asked to make a determination on a Request for Reconsideration concerning the NGPC's own actions”;
- and
- Asked how the BGC “will be administering the conflicts review as the BGC is also responsible for making a determination regarding potential conflicts.”

ICANN **never responded** to these questions or the observation that the BGC had only one member “without apparent relationship to the parties involved or prior involvement in the matter.” Attached for your convenience is a copy of the letter, which ICANN posted on its website page for our Request for Reconsideration. We did *not* waive the conflict.

We agree with your acknowledgement that the “existing structure has some issues.” However, the suggestion that the fundamental and inherent unfairness we have identified can be rectified in the future through the current accountability structures review and the review of the New gTLD Program does not address our request that our Reconsideration Request receive an unbiased review.

Finally, once your final report is completed, we request that you publish it without redaction along with both this letter and our February 25, 2015 letter.

With best regards,



Kristina Rosette
Sr. Corporate Counsel

cc: Scott Hayden, Vice President, IP
Dana Northcott, Associate General Counsel, IP

Attachment



Request 14-27: Amazon EU S.a.r.l.

- [Request 14-27](#) (30 May 2014) [PDF, 181 KB]
 - [Annexes 1-5 to Request 14-27](#) (30 May 2014) [PDF, 846 KB]
 - [Annexes 6-10 to Request 14-27](#) (30 May 2014) [PDF, 19.85 MB]
- [Letter from Flip Petition to BGC Members](#) (3 June 2014) [PDF, 78 KB]
- [Letter from Flip Petition to NGPC and BGC Members](#) (2 August 2014) [PDF, 476 KB]
- [BGC Recommendation on Reconsideration Request 14-27](#) (22 August 2014) [PDF, 178 KB]
- [Letter from Flip Petition to NGPC Members](#) (4 September 2014) [PDF, 505 KB]
- [New gTLD Program Committee Action on Reconsideration Request 14-27](#) (8 September 2014)

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June 3, 2014

To the attention of the members of the
ICANN Board Governance Committee
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292

By e-mail: reconsideration@icann.org

Request for Reconsideration of the Decision of August 21, 2013 Materially Affecting Amazon EU S.à.r.l.

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

I write to the Board Governance Committee (“BGC”) further to Amazon E.U. S.a.r.l.’s (“Amazon”) Request for Reconsideration of the New gTLD Program Committee’s May 14, 2014 Resolution that prevents the applications for .AMAZON and IDN equivalents (the “Amazon Applications”) from proceeding. Amazon asks for clarification as to how the BGC – which is preparing a recommendation to the Board - will address the review. Quite in contrast with the Requests for Reconsideration that relate to a Staff action, Amazon’s current request implies a review of an ICANN Board decision. In brief, BGC members are now asked to review and consider a decision in which the majority of BGC members were involved and with which they agreed. Amazon is wondering how this issue will be addressed.

In addition, one BGC member (who is currently a non-voting member of the BGC) may have a conflict as his company is the backend registry provider of record for three of Amazon’s applications (unrelated to the applications at issue here) (and for the record, we are not questioning whether this member will declare a potential conflict, but rather its effect on the process). This leaves only one member of the BGC without apparent relationship to the parties involved or prior involvement in this matter.

Similarly, my client requests clarification on how the BGC will make a recommendation on the merits of the Request for Reconsideration. Will this recommendation be addressed to the full Board of Directors, the Board of Directors without the NGPC members (who took part in the decision), or will the NGPC be asked to make a determination on a Request for Reconsideration concerning the NGPC’s own actions)?

Finally, my client asks the BGC for clarifications on how it will be administering the conflicts review as the BGC is also responsible for making a determination regarding potential conflicts.

Yours sincerely,

A handwritten signature in black ink that reads "Flip Petillion". The signature is written in a cursive, slightly slanted style.

Flip Petillion
Crowell & Moring LLP
Contact Information Redacted