

## **Analysis of the .bank decision on Material Detriment and Substantiality of Opposition**

### *1. Background*

On November 26, 2013, the International Centre for Expertise of the Chamber of Commerce (ICC) posted its decision in the matter of a Community Objection brought by the International Banking Federation (IBF) against the DotSecure Inc. (DSI) application for .bank. The decision is attached as Annex 1 and the original objection and responses are available at <https://www.dropbox.com/sh/ia6mdri0drlasv9/kRoOhtz9u>. DSI has filed a Reconsideration Request to be submitted to ICANN under Article IV, clauses 2.2 (a) and (b) of the ICANN bylaws.

### *2. Grounds for Objection – Merits*

[1] The AGB provides that Community Objections are to be heard by a Dispute Resolution Services Provider, and that the ICC is appointed to fulfil that role. The procedures to be followed are provided in the Attachment to Module 3 in AGB (the Procedure) and Rules for Expertise of the ICC (the Rules). A single-member Panel is to be appointed. The AGB sets out the standards against which the Objection is to be measured, noting that the Objector bears the burden of proof in relation to each one, and that the Objector has to succeed on all grounds for the Objection to succeed. The 4 standards are set out in AGB 3.5.4, and say, in summary:

(1) The Community invoked by the objector has to be ***clearly delineated***;

- (2) The opposition by that community to the application has to be **substantial**;
- (3) Between the community and the string there must be a **strong association**;
- (4) There must be a **likelihood of material detriment to rights and legitimate interests of a significant portion** of the community, to which the string must be **targeted**

### *3. The Objector's case on Substantial Opposition.*

[2] IBF presented evidence in its objection under the heading "Breadth and Scope of Opposition to Dotsecure's application", referred to a "collective position" of opposition by IBF members and referred to Annexes D and E in its objection, containing letters of support of IBF's opposition to the DSI application, and statements of opposition to the DSI application filed in the ICANN public comments process.

[3] Annex D contains letters from 17 banks or banking associations based in the USA and Europe. The 3 most significant were the RBS, Deutsche Bank and the European Banking Federation.

[4] The letters are clearly formulaic; they each contain (in somewhat rote form) statistical claims about the cost of certain cybercrimes currently, a complaint about Directi companies in relation to UDRP and the source of phishing complaints, and an allegation that the operation of .bank will cause them to spend more money on defensive registrations themselves. It is obvious they have been promulgated by the IBF, and that the individual banks probably have very little direct experience of the matters raised in their letters.

[5] Appendix E contains 6 submissions made in the ICANN public comment process. The first is from Nationwide Mutual Insurance of Ohio, and criticises DSI registration policies as leading to abuse and confusion. Trust is said to be important in this regulated industry. DSI is neither well established nor long standing, and is not a FSI member, so lacks the knowledge and incentives to properly implement anti-abuse measures. A second comment is irrelevant, while the third comes from General Electric Company. It stresses the importance of background checks on applicants and other ICANN processes and calls for their careful implementation. It also does not believe in proprietary gTLDs, and that .bank should be run on a rules-based open process for all banking-related companies. The fourth comes from an attorney for Discover Financial Services. He alleges the public will assume a .bank has approval of the banking community, which will be deceptive as this application does not. He (mistakenly) believes this is a community application, and complains it lacks the requisite indications of community support. The fifth comes from a “Jennifer Jones”. It is in support of comments filed in the 6<sup>th</sup> submission, discussed below.

[6] The sixth submission is a major one, consisting of a letter in 6 parts, and which references a further version of that letter plus attachments that consists of 453 pages. The letter comes from the attorneys for Karsten Manufacturing Corporation, the owners of the PING trademark, registered and used in relation

to golfing equipment. It was apparently filed in relation to Radix's application<sup>1</sup> for .ping, as well as the remaining 30 Radix applications. In summary it points out the links between Bhavin Turakhia, Directi, the registrar PrivacyProtect.org, and says that the registrar has been the losing respondent in over 45 UDRP cases. Copies of the decisions are attached, as are blog posts dated 2008. As the AGB precludes applicants with 3 or more adverse UDRP decisions recorded against them in the last 4 years, it is said that bars all the Directi Group companies' applications – including the DSI application for .bank.

#### *4. The Applicant's case on Substantial Opposition*

[7] DSI argues that each of the grounds of the objection contained in the 17 Annex D letters of the objection is untrue and factually incorrect and puts them in contention. The cost of cybercrime generally is not an attack that DSI needed to answer, but it directly rebutted the allegations in relation to Directi by explaining that it was a separate company, and Directi itself filed a detailed answer to the allegations. Further, DSI explained that its registry policies were the same as those of fTLD on all relevant grounds and could not cause an increase in defensive registrations by members of the global banking community in comparison to the fTLD application, which was the way the argument was presented by IBF.

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<sup>1</sup>It is appreciated that separate companies in the Directi group (all under its subsidiary, Radix) have been the actual applicants in each case

## 5. *The Decision on Substantive Opposition*

[8] The panel finds that the opposition is sufficiently substantial. He says that the representative nature of the Objector itself, the stature of the Annex D objectors, and their geographic and cultural diversity are sufficient. However, he makes no *findings of fact* on any of the matters alleged in the Annex D letters, or elsewhere where those allegations are repeated by IBF. At para 177 of the determination he expressly declines to rule on them, saying:

*“These are very serious allegations. If the material detriment to the community arising out of Dotsecure’s lack of experience with banking was not so obvious, the Panel would have ordered a hearing to more fully develop the evidence with respect to these other claims by IBFed and Dotsecure’s responses.”*

[9] The Panel makes no finding in relation to the Karstens letter at all, which is appropriate, as that company is not a member of the community, nor does it purport to give evidence about that community. The situation is different in relation to the letters from the FDIC (of December, 2008), from the Canadian OSFI (of November, 2009) and from the European Commission to applicants (of November, 2012). At paragraph 28 the Panel says that those letters, although not binding, have been helpful to the Panel in determining the nature of community objections, how to assess the association between the community and the string (targeting) and in “identifying factual elements relevant in assessing the likelihood of material detriment...”

[10] The Panel falls into error in considering those letters in relation to substantiality of opposition. At paragraph 39 of the determination it says that the FDIC letter raised policy concerns “..*relevant to the determination of ‘substantial opposition’, ‘strong association’ and ‘material detriment’*”.

[11] That FDIC letter was written well before the AGB was finalised, and before the filing of, and therefore completely without regard to, the DSI application. In fact, most of the matters raised by the FDIC have been taken into account by either the AGB, the ICANN processes created during the life of this Objection, notably the PIC Spec and PIC Spec DRS, and the DSI application itself and all the protection mechanisms built into the DSI application for .bank. Accordingly, it is improper to take anything from this letter into account in relation to the substantiality of the opposition to this application from the community. Properly understood, given that the matters raised in the letter have been dealt with, and that there has been no further objection to the final AGB, and no opposition filed by the FDIC, it is equally open to assume that there is no further opposition from the FDIC.

[12] The Panel’s analysis looks only at the substance of the Object**ors** rather than the substance of the Objection**ion**. The DSI position is that the matters raised by the Objectors in the Annex D letters are factually incorrect, or misstated: there is no evidence that the problems they complain of in the present environment will prevail in .bank, there will be no examples of UDRP/URS cases and of phishing under the policies laid out by DSI’s application and the norms agreed to by

ICANN pursuant to GAC advice, and banks will not need to make any defensive registrations. Yet the letters provided by IBF to demonstrate substantial opposition to DSI's application allege that DSI's application will result in increase in abuse and defensive registrations. These allegations are inaccurate and baseless. DSI explains that current cybersquatting and other abusive practices occur in legacy TLDs, which do not enjoy any of the protections built in to its .bank application.

[13] While nothing in the AGB actually requires that the concerns expressed by opponents be valid, it cannot be the case that a substantial but misguided or inaccurate opposition meets the criterion of "substantial opposition". We submit that an opposition can be considered as substantial only if the facts stated with respect to the opposition are accurate and supported by evidence. The fact that the mistaken impression has been deliberately created by the opponent is a further factor that cannot be ignored.

[14] Moreover, the failure to rule on these matters is important, as they lead in a very related way to the discussion and eventual finding of material detriment. The ICC panellist found that DSI was not a member of the global banking community, and that fact alone would cause material detriment. The substance of the objections was that DSI was an inappropriate steward for .bank, which in turn is the primary and infact only argument the panellist uses to render its decision on material detriment. DSI was entitled to a finding that confirmed that it was an

independent company, and an appropriate steward of the .bank TLD, as indeed the ICANN evaluation had already found.

#### *6. Objector's case on Material Detriment*

[15] The IBF argued that allowing DSI to operate .bank would cause harm to members of the banking community under a number of headings around six broad themes:

(1) DSI is a poor steward of the TLD, as its associated or involved with known cybersquatters, so the registry would be run without adequate protection against abuse; its commitments will not be binding and it cannot be trusted.

(2) DSI was not a part of the heavily regulated and complex world of Internet banking, so would not do a proper job of complying with those regulations;

(3) There is a competing application by an "inside group" that is much better for the banking industry;

(4) DSI had not shown itself to be financially secure enough;

(5) DSI policies will force community members to file defensive applications;

(6) The context of the application invokes GAC advice, and letters from FDIC, OSFI and the EU, which support the Objectors position.



## 6A. Stewardship

[16] The IBF points to an APWG report that named Directi as a Registrar being responsible for *“the largest percentage of malicious domain name registrations of any named registrar”*. They produced a chart showing 12% of domains used for phishing in 2012 were registered via Directi as a registrar. A later table showed this to consist of 558 names out of 1.7M names under management (DUM), and, normalised on a percentage of names under management, Directi ranked 8<sup>th</sup>. On that basis, Directi had a ratio of 0.32, while Melbourne IT had 146 names/1.9M DUM, or 0.08, while GoDaddy had 418 names/30.34M DUM or 0.01. IBF said this *“indicated a track record in connection with this type of malicious activity”*. They said there was a *“likely causality between Directi’s lack of sufficient safeguards in its registration process and the number of malicious domain names”*.

[17] A second strand to this argument was to point to the performance as a Registrar of a Directi-owned company, Public Domain Registry (PDR) which had been involved in 75 UDRP cases. This was set against contractual terms in the RAA that allowed a registrar to *“delete, suspend, cancel etc”* any names under a *“wide range of instances”*. Not to do so was characterised as a “breach” and as a “failure to act”. Failure to *“proactively address cybersquatting”* had cost members of the community money in UDRP proceedings and called Directi into question as a *“proper steward”*. Directi’s existing conduct was already causing material detriment to members of the community.

[18] In its reply of 3 July 2013, to Directi rebuttal and explanation on these points, IBF invited the panel to “*reach his own conclusions*” and referred to a spam outbreak involving dot PW. IBF also acknowledged some “*reactive*” mitigation steps were taken by Directi, but said that harm occurred within minutes/hours after registration and DSI had not “*proffered a proactive approach to mitigate this activity.*”

[19] A third strand was to point to the Karsten complaint about the use of proxy registrations by PDR. The claim is made that, although the DSI application says it will prohibit proxy registrations, because that undertaking is not filed by a community applicant (and therefore made compulsory by CI 2.19 of the Registry Agreement) it is not a legally binding obligation. The “*potential use of proxy registrations*” is said to represent a “*clear and material detriment*”.

[20] In its notice of Objection, the IBF said that DSI has not filed a PIC statement, so the undertakings as to how it will run the registry are unenforceable. DSI had filed a PIC spec by the time of a reply filed 3 July 2013. IBF asserted that, having read that PIC spec, it “*stands by its concern regarding a likelihood of material detriment*”.

[21] Note that much of this discussion would have been rendered moot had the ICANN staff updated ICC on changes to the PIC Spec regime as a result of adopting GAC advice

6. *B DSI is an Outsider*

[22] IBF says that because DSI is not a member of the community, it will put its own financial interests ahead of the community, and because of its track record, this will create a likelihood of cybersquatting and a “*broader loss of institutional reputation*” within the TLD.

[23] It also says that there is a global regulatory framework and private sector members of the community work within that framework for the good of the community. Allowing DSI as an outsider to run the .bank TLD challenges this practice of self- governance.

[24] An outsider will maximise revenue at the expense of the community. Then-current registrar opposition to the law enforcement changes being sought to the Registrar Accreditation Agreement are said to be an example of Registrars putting profits before principles.

[25] A portfolio applicant will seek to adopt uniform rules across its portfolio, and these will be of a lesser standard.

[26] A previous example of a community-based TLD being operated by an outsider that went wrong is dot Pro, which changed hands, and which has had several changes of policy.

[27] Again, updates from ICANN staff to ICC on the agreements to a new RAA, and its terms, and the PIC specification would have removed at least some of these issues from contention.

### *6. C Competing Application*

[28] Although acknowledging that simply not getting the TLD in a contest with the applicant is not a ground of objection, the Objector takes time to expound the greater benefits of the fTLD community application. (In all but name, this competing application must be treated as the Objector's application for the purposes of that provision in the AGB). The alleged benefits include the binding nature of community policy (via Clause 2.19), against the non-binding nature of the DSI PIC Specs. Any future changes to the contract will require ICANN board approval. fTLD is held up to be a good corporate citizen for its work on developing ICANN policy, providing "*sound thought leadership*" whereas Directi has been merely applying for "*a large portfolio of strings*". Because it is a member of, or associated closely with the community, fTLD will not put profits before principles. An example of this already is fTLD's work on ICANN policy.

### *6. D Adequacy of resources*

[29] Radix has filed for and intends to operate 31 new TLDs. The Objector does not have access to the financial records, and does not know whether Radix can provide sufficient resources to "*ensure the stable and secure operation of the .bank gTLD*".

### *6. E Defensive Registrations Likely*

[30] If DSI runs the registry, (for unstated reasons) members of the community will have no option but be obliged to register their brands defensively in .bank.

The alleged costs of defensive registrations are put at millions by the treasurer of INTA and by the ANA in oral testimony before the US Congress in 2011.

### *7. The DSI response - Material Detriment*

[31] In Annex 6.1 DSI shows that the security and anti-abuse provisions of its application are arguably equal to that of the fTLD application. Specifically, they include all of the BITS specification, no proxy registrations, DNSSEC, searchable whois, eligibility rules and other such policies. An equally strong naming policy with prior checking is in place. Only members of the community (registered banks) may register. Violations of a long list of policies- including hacking, spamming and phishing are treated as abuse. Not a single objectionable policy or policy gap has been identified by the Objector. The allegations that DSI will not do the job properly are not supported by any specific evidence, while the detailed DSI application has been through ICANN's evaluation process and been found satisfactory.

[32] In Annex 6.2 DSI exhibits its PIC Spec. This makes a number of clear commitments, including banning proxy registrations, and which are enforceable in the contract. Furthermore, DSI points to the previously existing (and still remaining) contractual enforcement clauses and the audit process by which ICANN monitors and regulates contractual compliance.

[33] DSI says that no valid comparison can be made between registrar conduct and registry conduct, so nothing can properly be inferred from the allegations about Directi/PDP. Apart from being a separate company anyway, with no prior

adverse record, it is the registry that sets the registration policies, which registrars enforce. Under the old rules, there are very few restrictions operating, which leads to abuse. Under the new rules, DSI has proposed many and adequate safety restrictions which will prevent much of the legacy abuse.

[34] ICANN has robust processes for background checking of applicants. The applicant is a separate company, with no disqualifying features. No qualifying questions were received as to the applicant's character. Annex 4.1 of the original DSI response contains a detailed response to the Karsten letter, pointing out its threats amounting to commercial blackmail, and giving details of the ICANN process which confirms that the applicant is qualified to proceed.

[35] No evidence has been provided of any likely damage to the reputation of the community as a result of DSI operating .bank. There is no evidence DSI will operate to the detriment of the community. The AGB requires the objector to point to the level of certainty that detriment will occur – there is none.

[36] .bank is a sensitive string, and has passed the additional ICANN evaluation that such strings are required to undergo.

[37] In Annex 6.3 Directi – the company attacked for its registrar compliance activity, sets out a rebuttal of the allegations of registrar misconduct. It notes: Directi leadership (Mr. Turakhia) has standing with local law enforcement, and has held leadership positions at ICANN; Directi has very good timeliness of response data – missing from the paper cited by the Objector; the level of abuse

is not a factor of registrar procedures, but lax registration policies by the 4 major registries most implicated in the statistics; Registrars have no authority to prevent anyone from registering in those domains; there was prior notice of only 3 of the 527 incidents reported; within 48 hours all names had been suspended, resellers accounting for 75% of sales were terminated; Registrars may (despite the contract provisions cited by the Objector) act only when they have notice of abuse – in none of the 70 UDRP cases cited was prior notice provided- Directi is actively working in the community (with Bank Of America) to combat abuse, and that work is well received.

Questions about DSI's financial resources are covered by ICANN evaluation. They do not constitute an element of any ground of Objection, and the Panel was wrong to infer anything from DSI's non-disclosure of its financial position.

[38] The objector knows that the existence of another application is not grounds for objecting. The existence of an allegedly superior application is not a ground for showing another application will cause material detriment.

[39] The argument that allowing another to operate dot bank will deprive the community of self-governance is untrue. The community is perfectly used to purchasing other services from outside suppliers, such as enterprise software, which is far more mission critical than a domain name. This is simply a bald claim that insiders want to run this for themselves.

[40] There is no evidence DSI will encourage cybersquatters because of a lack of relationship with the banking community; instead, its policies actively prevent that.

[41] There is no evidence to support the allegation that DSI operation will oblige defensive registrations. There is evidence to the opposite effect, that DSI naming policies will protect brands and not require defensive registrations.

### *8 The Decision on Material Detriment*

[42] The Panel begins its consideration of the case by reference to the letters received from the European Commission and the FDIC, mentioned above. Noting that they do not constitute standards and are not binding on the panel (para 28), the Panel nevertheless quotes from them, particularly from the FDIC letter. The panel says (para 28) they assist the Panel in “*identifying the factual elements relevant in assessing the likelihood of material detriment.*”

[43] In relation to the EC letter, the panel says it “*illustrates the heightened sensitivity for European policy makers and regulators with respect to how the .bank string must be managed.*” With respect, the Panel should be careful in reading anything into that letter. The letter is outside the ICANN policy development process and also outside the process adopted by the GAC, of which the EC is a member. One must assume from the lack of any further action by the EC that it is satisfied by the GAC processes that followed that letter, in particular the GAC advice on sensitive strings given at ICANN’s Beijing meeting



in April 2013. Being aware of “governmental sensitivity” around the rules for .bank should not alter the Panel’s approach to its task of determining a Community Objection.

[44] The FDIC letter dates from December 2008 – well before the final AGB was decided, and well before any applications were prepared. The Panel quotes extensively from the letter (para 38) and notes that ICANN did not adopt all the recommendation in the AGB. Most, if not all of the remaining recommendations have been substantially incorporated in the AGB. It is important to note which recommendations were **not** adopted by the public, community-driven ICANN policy development process, and which have also not been required by the GAC. It would be a mistake by the Panel to seek to introduce any of those requirements via this community objection process.

[45] The FDIC letter recommended:

(a) That only applications sponsored “top down” be allowed, to prevent unsponsored (by the financial services industry) applications from proceeding;

(b) That any gTLDs that issue should be managed within an *“industry and regulatory framework”*;

(c) That any such TLDs should be explicitly endorsed by the *“financial industry community including regulatory bodies”*;

(d) That they be “*subject to community established governance rules, including various laws, regulation, guidance and policy established by the financial sector regulators*”.

[46] Given the rejection of these requirements by ICANN, it would be a mistake by the Panel to include consideration of any such elements in determining this Community Objection. ICANN expressly allowed parties from outside a regulated industry to make applications targeting those communities, perhaps in part to prevent “industry capture” and to provide competition in regulated spaces. Communities were deemed protected sufficiently by an Objection process, by which communities have to demonstrate not a theoretical risk of harm, but a likelihood of material harm to their rights and legitimate interests. A finding that an objection succeeds because it meets these deliberately-rejected criteria is a failure of the Objections process and a failure on part of the ICC and the panellist to follow the policies laid out in the AGB.

[47] The Panel quoted the OSFI letter of November 2009. The gist of that letter is that it is an offence in Canada for a non-licensed bank to “*indicate or describe a financial services business in Canada.*” The Panel says this shows the difficulty a holder (sic; “operator”) of the .bank gTLD would face if it were not “*embedded inside the banking community*”. Given the importance of his later finding **against DSI because** it is not embedded, it is important to note that this conclusion is wrong on its face. The Canadian rule is not activated by a new gTLD. A gTLD operator is not offering a financial services business but a domain registry

business, and is unaffected by the Canadian law. It is the **users** of the .bank at the second level that have to comply, if they wish to register as name.bank, and trade under that domain name as a bank in Canada. DSI supports compliance with this rule, as its naming policy explicitly requires that registrants at the second level be licensed banks.

[48] What may be significant is that from the positioning of this discussion in its Decision, the Panel appears to have reached this conclusion at the earliest stage of its reasoning, before considering the merits of the arguments, and before reviewing any of the evidence. It appears to have been influenced by these very early pieces of correspondence, selected from among thousands of submissions filed in the ICANN process, that a .bank TLD needed to be operated by someone embedded in the global banking community.

[49] The Panel in paragraphs 102 to 113 inclusive has fairly summarised the respective arguments. As he explains at para 44, this summary is not intended to be exhaustive, and doesn't need to be.

[50] At para 156 the Panel refers again to the idea put forward by the FDIC that financial services strings should “*be managed only by institutions within the financial services regulatory framework and endorsed by the financial services industry and financial services regulators*”. He notes, and it is common ground that DSI is not within the financial services community, and is not endorsed by industry or the regulators.

[51] The Panel finds (at para.159) that DSI's lack of an existing relationship with industry is *"sufficient by itself to create a likelihood of material detriment..."* and further again in para 177 – *"If the material detriment to the community arising out of Dotsecure's lack of experience with banking was not so obvious, the Panel would have ordered a hearing .... The material detriment arising out of Dotsecure's lack of relationship and familiarity with the global banking community, banking and bank regulators is too clear."* These paras clearly demonstrate that the Panel based its entire finding of material detriment on the fact that DSI is not a member of the banking community and did not consider any other criteria. This tantamounts to the panel alleging that .bank can only be run by someone from within the banking community and any other applicant running it would result in material detriment. This assumption is not supported by any evidence.

[52] In the following paragraphs the Panel goes into more detail about what that detriment is:

(a) At 160 he says it is *"extraordinarily difficult to have familiarity with that banking and bank regulatory environment when one has no relationship with the community..."* No evidence from the industry itself expresses the difficulty as being at that level.

(b) At 161 he describes the composite layers of complexity of banking regulations in the UK and US- seemingly from his own experience, as there is no source cited, and no evidence filed on the topic.

(c) At 162 he asserts that this level of “complex overlapping regulatory environment” is not only in the US and UK, but many other regions.

(d) At 163 he lists the consequences of that lack of community experience, as including “*inadvertent non-compliance with bank regulatory measures*”, *delays in obtaining regulatory consents, difficulties in resolving overlapping requirements, and improper avoidance of regulatory measures...and in “significant concerns on the part of regulatory authorities over the possibility of fraud, consumer abuse, tax evasion and money laundering, and other financial crimes”*.

[53] At 164 the panel describes the consequence of delays as adversely affecting the reputation of the banks, and says they are not in the interests of the global banking system.

[54] At 165 he says that to the extent delays materialize, financial payments and transfers effected online will be adversely affected, interfering with funds transfers and settlements.

[55] At 166 the Panel finds that DSI’s lack of experience raises the level of certainty of the likelihood of these injuries materialising and is far too high to sustain the application.

[56] The Panel then describes the dispute over the “stewardship” argument outlined above, and finds that it would have been the subject for a Hearing to clarify, but gives no decision because of his finding immediately above in relation to the “DSI is an Outsider” argument.

[57] He recalls the “increase in defensive registrations argument” at 180, but does not deal with it by reference to the DSI rules which demonstrate that no increase defensive registrations would occur due to its registration policies.

[58] He refers finally to the existence of the competing application by fTLD and declines to adjudicate between the competing applications.

#### *9 Material Detriment – conclusion*

[59] There are several aspects of the findings on material detriment that are inadequate and unsatisfactory, and most importantly outside the rules of the AGB, including the Panel’s adherence to the requirements proposed in 2008 by the FDIC as set out in para 68, above. ICANN expressly rejected a rule or rules which would have had the effect of limiting registries for sensitive strings in regulated markets from being operated solely by members of the industry concerned. Arguably, this was because to do so would frustrate some key goals of the new gTLD programme which was to open up the TLD space to competition, and to promote innovation. Restricting applications to those only from incumbents is the antithesis of that express policy approach.

[60] To do what the Panel has done is to write a new rule into the AGB for the management of strings for regulated markets. It amounts to saying that dot finance, dot insurance, dot broker, dot law – and many others, can only be operated by members of the communities targeted by those strings.

[61] It seems clear that the Panel has held that view from the beginning of the decision, given his approach to the letters from authority cited in his opening remarks. The Panel has taken the theoretical approach suggested by the FDIC as to who should run a heavily-regulated TLD and agreed that this should be the case.

[62] There is no evidence of the matters referred to by the Panel in his justifying paragraphs discussed in paragraphs 75 – 78. The Panel appears to confuse the issue of running a banking operation under the regulations with running a Top Level Domain registry. It is manifestly possible for suppliers of other services (e.g. Legal, IT, Insurance, HR) to do so without being members of the banking community.

[63] The Panel ignores the protections provided contractually by the DSI application, and ignores also that what will be offered is an optional voluntary service. We are talking about selling domain names, not banking services. Alleged Delays in clients acquiring new .bank names can have no impact on financial settlements or banking transactions. Banking customers already have existing domain names, and will not switch from them until they are properly registered under the rules and running safely. Many may choose not to register

at all, with no adverse impact. The threat to the banking system is a substantial exaggeration. There is no evidence that DSI's running of the .bank registry would result in any harm to the banking industry, including alleged delays in granting domain names or any form of abuse. Infact DSI's actual application and PIC statement provide evidence to the contrary.

[64] Under the AGB, the Objector has the burden of showing a likelihood of harm. The Objector didn't meet that burden. Instead, it posed a theoretical model of management and said it preferred that a member of its own industry should run the TLD. It made a series of allegations against the character of the applicant, which were answered in full by the applicant, but not resolved by the Panel.

[65] There is no indication of any policy, or of any specific act relating to domain name registration in this TLD that would be adversely affected by the choice of Registry operator. They alleged simply that it was complicated. The Panel supplied his own evidence that the regulatory systems were complex and overlapping, but failed to link that to any specific element of domain name registration that would be affected. The only specific harm mentioned was possible delay in achieving registration, but there is no evidence corroborating the same, and, even assuming that a delay can without further explanation be responsible for harm, does not meet the evidentiary burden on the objector to show a likelihood of harm. It remains at best an ill-defined possibility. No degree of probability of occurrence can sensibly be attributed to it in the absence of a



proper description of the harm, which means it fails to meet the threshold of “likelihood”.

[66] Much was made by the Objector of the existence of the competing application by an industry insider, with whom the Objector is closely related. No specific advantage of the alleged familiarity of the Banking regulations that this operator is said to possess was referred to in evidence.

[67] The Panel declined to agree with the Objector on all of its actual grounds for purported material detriment, including the stewardship “smears”, the alleged loss of self-determination, (which is simply a disguised plea for the community-based applicant to succeed), the alleged increased risks of cybersquatting, the putting of profits before principles, and the increased likelihood of defensive registrations. What is left is the conclusion of the Panel of finding a likelihood of material detriment simply because DSI is not a part of the banking industry, based on adherence to the FDIC principles, and not supported by any evidence.

[68] The Panel failed to find against DSI on most grounds raised by the Objector, agreeing simply that it should not be run by an outsider, without demonstrating that that fact caused material detriment and identifying that detriment. That is not a ground of Objection, and was rejected as a ground by ICANN.