REQUEST FOR RECONSIDERATION

TO THE ICANN BOARD GOVERNANCE COMMITTEE

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1. Requester Information

This Request for Reconsideration is submitted on behalf of European State Lotteries and Toto Association (hereinafter "European Lotteries" or the "Requester"), an association under Swiss law having its registered offices at 1005 Lausanne (Switzerland), Avenue de Béthusy 36.

European Lotteries is represented in this matter by Philippe Vlaemminck, Paul Maeyaert and Kristof Neefs, attorneys (avocats) at Altius having their offices at 1000 Brussels (Belgium), Havenlaan 86C (P.O. 414). European Lotteries can be contacted by e-mail to Contact Information Redacted or by phone at Contact n ormation Redacted (Altius switchboard).

2. Request for Reconsideration

This Request relates to ICANN Staff action.

3. Action subject to Request for Reconsideration

European Lotteries requests reconsideration of the International Chamber of Commerce ("ICC") Expert Determination[1] of 9 December 2013 in Case EXP/422/ICANN/39 (**Annex 1**, "Determination") and of ICANN's acceptance of that Determination. The Determination resulted in the rejection of European Lotteries' community objection to Afilias Limited's application to operate the gTLD '.LOTTO' (**Annex 2.3**, "Application").

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[1] According to BGC Recommendations 13-5 (p.4), 13-9 (p.4) and 13-12 (p.3) decisions on gTLD objections are, although they are taken by third parties, actionable under the Reconsideration process. Because these decisions are not Board action, they qualify as Staff Action in accordance with Art. IV, §2.2.a of the ICANN Bylaws.

4. Date of action

The Determination is dated 9 December 2013.

5. Date the Requester became aware of action

The Determination was communicated to the parties, including European Lotteries, by e-mail on 10 December 2013 (**Annex 10**).

6. European Lotteries is materially affected by the action/inaction

European Lotteries is materially affected by the Determination. It is directly affected financially because it has to bear the costs of the ICC proceedings pursuant to Article 14 of the New gTLD Dispute Resolution Procedure (the "Procedure"). More importantly, European Lotteries is materially affected because it is deprived of the opportunity of blocking the delegation of the gTLD '.LOTTO' for operation as an open TLD, which will negatively impact its members and, ultimately, consumers. As a result, the Determination prevents European Lotteries from furthering one of the purposes in its Statutes, *i.e.* to advance the collective interests of its members, state-licensed and state-operated lotteries.

7. Third parties stand to be materially affected by the action/inaction

In addition to material harm inflicted to European Lotteries, the dismissal of European Lotteries' objection will give rise to significant consumer harm and, in turn, it will materially affect the community on whose behalf European Lotteries has filed the objection (i.e. European Lotteries' members and the members of World Lottery Association).

A. Consumer harm

Because the Determination results in the dismissal of European Lotteries' community objection, it paves the way for the delegation of the .LOTTO gTLD. Since Afilias intends to

operate the .LOTTO string as an open TLD, delegation[2] would make domain names in the .LOTTO space available to all registrants, including unlicensed lottery operators and companies active in the gambling sector, which is heavily regulated in many jurisdictions and illegal in others.

As is argued at length in European Lotteries' objection (**Annex 2.0**, §8) and as was confirmed in the Determination (§8.14), the general public associates the term 'LOTTO' (and 'LOTO') with state-licensed or state-operated lotteries. Such operators offer, because of extensive and demanding regulation in many jurisdictions, safeguards for consumers that unlicensed operators will not or cannot provide. By registering and using domains in the .LOTTO space, unlicensed operators of games of chance will be able to associate their website and product offering with state-licensed or state-operated lotteries[3]. In doing so, unlicensed operators will take advantage of the implied trust of the general public in businesses operating with the term "LOTTO". This alone would cause significant consumer harm, because unlicensed (and illegal) offerings of games of chance are not subjected to the same regulatory requirements designed to protect consumers.

That finding is confirmed by the Government Advisory Committee ("**GAC**") Beijing Communique of 11 April 2013 (**Annex 8**), which was issued *after* the objection filing

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[2] Afilias will also have to pass Extended Evaluation, so the actual delegation of the TLD is not a direct result of the Determination. However, the challenged staff action leads to the loss of the opportunity to prevent harm.

[3] In fact, from a press release issued by Afilias' lawyers *after* the Determination was issued, it is clear that this is indeed the type of behaviour that Afilias intends to promote (**Annex 11**). The press release touts that the Determination "*has considerable impact on the economy of convergent gambling markets",* meaning that Afilias would indeed allow (and encourage) unlicensed operators to operate in the .lotto space alongside licensed and state-operated lotteries. Afilias confirmed this in its Response (**Annex 3**, p.10) where it states that "*it lies in the nature of a gTLD that such TLD is generally open for all registrants".*

deadline of 13 March 2013[4]. The GAC Beijing Communique identifies .LOTTO as a string that is "*linked to regulated or professional sectors".* According to the GAC, "*these strings are likely to invoke a level of implied trust from consumers, and carry high levels of risk associated with consumer harm"* (p.8 of the GAC Beijing Communique).

B. Licensed and state-operated lotteries

If the .LOTTO gTLD would be delegated, the abovementioned use of the gTLD by unlicensed (illegal) and even fraudulent operators to mislead consumers would also negatively affect European Lotteries' members, state-licensed and state-operated lotteries. As the Determination acknowledges, the term LOTTO is associated with such operators so any negative experience internet users may have with websites to which a .LOTTO domain refers will negatively impact licensed and state-operated lotteries' reputation, creating a vicious circle of consumer deception and harm to the reputation of licensed operators.

8. Detail of Staff Action

A. Background

On 13 March 2013, European Lotteries filed a Community Objection (**Annex 2.0**) against Afilias' application to operate the gTLD .LOTTO with the ICC. On 13 May 2013, Afilias submitted a response (**Annex 3**). On 3 July 2013, after the parties had wire transferred an advance payment in the amount of 53,600 EUR to the ICC, the file was transferred to the Expert, Mr. Clive Duncan Thorne (**Annex 5**, the "Expert"). On 4 July 2013, European Lotteries sent a letter to the Expert to request an additional round of written submissions in accordance with Article 17(a) of the Procedure (**Annex 6**). On 8 August 2013, the Expert

[4] It was, however, issued *before* the 13 May 2013 deadline Afilias had to respect for its response. It is telling that Afilias did not have the candour to submit this document to the Expert for consideration.

informed the parties that he was *not* prepared to allow additional written submissions (**Annex 7**). On 10 December 2013 (more than *five* months or 160 days[5] after the constitution of the Expert Panel) the ICC sent a copy of the Expert Determination to the parties (**Annex 10**).

B. The Expert Determination

In the Expert Determination, it was decided that European Lotteries's objection meets all but one of the requirements for a community objection and the objection was rejected. The Expert decided that European Lotteries had standing to object, i.e. that it is an established institution having an ongoing relationship with a clearly delineated community consisting of state-licensed and state-operated lotteries (Expert Determination, §4). He confirmed that the community represented was a clearly delineated community (Expert Determination, §6). He accepted that the opposition against the application is substantial (Expert Determination, §7). Importantly, the Expert also agreed that there is a strong association between the applied-for-string and the community on whose behalf the objection was filed (Expert Determination, §8).

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[5] Article 21(a) of the Procedure requires that the DSRP and the Panel "*shall make reasonable efforts to ensure that the Expert Determination is rendered* ***within forty-five (45) days*** *of the constitution of the Panel".* In this case, that means the determination had to rendered at the latest by 17 August 2013. It was not. The ICC communicated the Determination to the parties on 10 December 2013. In an attempt to justify this delay of about four months, the ICC says that the term for scrutiny in accordance with Article 21(b) of the Procedure is not included in the 45-day term of Article 21(a) of the Procedure. European Lotteries disagrees with this interpretation of Article 21 because that provision is directed both to the Panel *and* the DRSP. Further, on one occasion where one of European Lotteries' counsels inquired by phone after the date the determination would be issued, the ICC Secretariat informed him that the decision in .LOTTO was a "*particularly problematic one*". Apart from remedies for other policy violations, European Lotteries requests an explanation from the ICC regarding the changes (if any) that have been made to the text of a decision during a four-month period of "*scrutiny as to form*". The delay in itself is a clear process violation and the ICC's (lack of) communication regarding the scrutiny process does not comply with ICANN's commitment to operation in an open and transparent manner, as required by Article III.1of its Bylaws. These process violations raise concerns regarding the so-called "*scrutiny as to form".* For that reason and in the interest of openness and transparency, European Lotteries requests the Board to order the ICC to disclose all information regarding the scrutiny phase.

In particular, he concluded that European Lotteries has proved "*that the term 'LOTTO' or 'LOTO' will be linked by the public to the operators of games of chance as represented by the Objector, i.e. state-licensed operators and that there is therefore a strong association between the community market and the applied-for gTLD string"* (Expert Determination, §8.14). On the requirement of a likelihood of material detriment, the Expert decided that "*the Objector has failed to prove 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"* (Expert Determination, §10.1.4). Since an objection must meet all requirements set out in Module 3 of the gTLD Applicant Guidebook ("AGB"), it was rejected by the Expert.

C. Policy violations

European Lotteries is aware that a Request for Reconsideration is not a *de novo* appeal[6], but rather a means to resolve process- or policy related complaints[7]. The mere fact that the Requester disagrees with the substance of the decision is not a proper ground for reconsideration.[8] Pursuant to Article IV, Section 2, 1.a of the Bylaws, the Reconsideration process was designed to provide remedies against Staff or Board action that violates ICANN Policy. In this case, the Expert's decision regarding the requirement of detriment, and by extension, the decision to reject European Lotteries' community objection, is indeed a violation of ICANN Policy. In particular, the Determination violates the following provisions:

- Article 20(a) of the Procedure, which requires that the Expert "*shall apply the standards that have been defined by ICANN";*

[6] BGC Recommendation of 1 August 2013 on Reconsideration Request 13-5 (booking.com), p.5.

[7] BGC Recommendation of 10 October 2013 on Reconsideration Request 13-9 (Amazon EU), p.8.

[8] BGC Recommendation of 29 October 2013 on Reconsideration Request 13-12 (Tencent), p.6.

- Section 3.5.4 of the AGB, in particular the Standards regarding the requirement of a likelihood of detriment (3-24 and 3-25 of the AGB);
- Article I.8 of the ICANN Bylaws, requiring that documented policies are applied neutrally and objectively, with integrity and fairness;
- Article II, §3 of the ICANN Bylaws, stating that standards, policies and procedures may not be applied inequitably or by singling out any particular party for disparate treatment unless justified by substantial and reasonable cause; and
- Article 4 of the Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, requiring that ICANN carries out its activities in conformity with international law.

The Standards provide the following on the requirement of detriment (emphasis added).

> *"The objector must prove 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. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment."*

It is important to note that the Standard to be applied is that the objector must prove that there is a *likelihood of* material detriment, *i.e.* a non-hypothetical risk that detriment would occur if the string subject to the objection would be delegated to the applicant[9]. Since

[9] The criterion is similar for oppositions in EU trade mark law. In that context, the Court of Justice of the European Union, has held that on the *"standard of proof required of the existence of unfair advantage taken of the repute of the earlier mark, it must be noted that it is not necessary to demonstrate actual and present injury to an earlier mark; it is sufficient that evidence be produced enabling it to be concluded prima facie that there is*

all objections are conducted before the contested gTLD is actually delegated, it is beyond doubt that the Applicant Guidebook – which was adopted following many years of discussion, debate and deliberation aiming to provide procedures that are designed to ensure fairness for both applicants and third parties[10] – does not require from the objector that he establishes *actual* harm[11]. If it would, the Community objection procedure would serve no purpose because it is impossible to provide such evidence.

Yet, is clear from several paragraphs of the challenged Determination that the Expert has misconstrued this requirement to mean exactly that.[12] Hereafter, European Lotteries will demonstrate that, in assessing the factors listed in the Standards as 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. While European Lotteries does not agree with the substance of the decision on detriment either, it will focus on the policy violations in arriving to this decision.

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a risk, which is not hypothetical, of unfair advantage or detriment in the future", see CJEU 12 December 2008 in Case nr. C-197/07 P Aktieselskabet v TDK, §22, available online at http://curia.europa.eu.

[10] BGC Recommendation of 10 October 2013 on Reconsideration Request 13-10 (Commercial Connect), p.9 and 13; BGC Recommendation of 29 October 2013 on Reconsideration Request 13-12 (Tencent), p.8

[11] See ICC Expert Determination of 23 October 2013 in Case No. EXP/471/ICANN/88 in re: .SPORT, **Annex 13**, §§155-156 (emphasis added): *"155. First, the Appointed Expert finds that the ICANN Guidebook does* ***not call for "actual damage" for an objection to be accepted.*** *It establishes a lower bar, namely a "likelihood of material detriment",* ***logical consequence of the impossibility of assessing any damage when the Applicant has yet to start operating the gTLD string****. 156. Therefore, the standard that the Appointed Expert should apply to this issue is the "chance" that detriment will occur, which differs from the standard of "actual damage" invariably applied in litigation or arbitration.* ***In other words, the standard of a "likelihood of material detriment" is, in the Appointed Expert's opinion, equivalent to future "possible" damage****."*

[12] European Lotteries does not contest that, in paragraphs 9.1 and 9.2 of the Determination, the Expert has recited the correct rule for assessing a likelihood of detriment. However, simply reciting the rule does not mean it was *applied* in a neutral and objective manner, as is required by Article I, §8 of the ICANN Bylaws.

The first factor in the Standards is the "*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*" (emphasis added). On this factor, the Determination (§9.10, emphasis added) reads that *"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".* In requiring proof of actual harm resulting from the operation of .LOTTO, the Determination is in violation of Article 20 of the Procedure and of the Standards.[13]

The second factor in the Standards is "*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".* On this factor, the Determination provides that (§9.17, emphasis added) *"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*

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[13] This finding is also inconsistent with the finding, sub §8.14, that LOTTO is associated in the mind of the public with licensed and state-operated lotteries. As the Panel in .ARCHITECT acknowledged in §178 of its determination in Case Nr. EXP/384/ICANN/1 (http://www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Expertise/ICANN-New-gTLD-Dispute-Resolution/EXP_384_ICANN_1_Expert_Determination/) , such association alone leads to a significant risk that internet users would be misled which would, in turn, cause reputational harm: "*The operation of the generic top-level domain ".ARCHITECT" as suggested by the Applicant in its Application would lead to considerable damage to the reputation of the community of architects. Internet users would necessarily assume that those who use the domain name ".ARCHITECT" are licensed architects. There is a considerable risk that internet users would be misled and this would, in term, cause harm to the reputation of the community of architects."*

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."* In other words, the Expert decides that the risks identified by European Lotteries are real but that European Lotteries has not proven that Afilias' registry policies are insufficient. As mentioned, such evidence is *impossible* to provide since the policies have not even been put to practice[14]. By requiring proof that Afilias' policies are insufficient while the circumstances to verify this were not even in effect, the Determination violates Article 20 of the Procedure and the Standards.

The third factor is "*interference with the core activities of the community that would result from the applicant's operation of the applied-for string".* The Determination provides that "*there is no evidence before it that the delegation of the applied-for gTLD to the applicant would justifiably* [sic] *interfere with core activities of the community as referred to by the objector. Accordingly the Objector has failed to prove such interference"* (§9.21). European Lotteries disagrees with this finding because it has clearly shown that the reputation of the community it represents stands to incur harm. Because state-operated lotteries are a heavily regulated industry in many if not all jurisdictions worldwide, the lack of any

[14] It is worth noting, in that regard, that the GAC has identified .LOTTO as one of the Category 1 applications – those that relate to strings "*linked to regulated or professional sectors"* that "*invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm"* – in its Beijing Communique (**Annex 8**). The GAC currently holds the view that such applications, including .LOTTO, will have to provide a.o. the following safeguards: "*At the time of registration, the registry operator must verify and validate the registrants' authorisations, charters, licenses and/or other related credentials for participation in that sector.*" It is clear then, that the GAC agrees with European Lotteries that the policies proposed by Afilias in the Application are **in**sufficient.

relationship between Afilias and that industry in itself amounts to a likelihood of detriment. Furthermore, the Expert'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. For that matter, in re: .BANK (**Annex 12,** §160), the Expert Panel held in similar circumstances, namely that there is a "*lack of an existing relationship with* [the regulated industry] *is sufficient by itself to create a likelihood of material detriment"* to the rights of the industry and, importantly, the users of its services. European Lotteries

The fourth factor is "*dependence of the community represented by the objector on the DNS for its core activities".* On this issue, the Determination reads that (emphasis added) "*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 products and services online they have websites registered under different TLD's. There is no evidence that consumers wanting to participate in their games of chance had difficulties finding their websites in order to do so. 9.24. 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."* This finding violates policy for two reasons. Firstly, the Standards require that the objector demonstrates his dependence *on the DNS*, not his dependence *on the applied-for string*[15]. If the gTLD applied for has not yet been delegated (the default situation in objection

[15] For the record, European Lotteries has filed its community objection because its members have legitimate concerns with the operation of .LOTTO as an open TLD, without any use restriction for licensed operators and –

proceedings), how can the objector prove that it depends on it? By concurring with Afilias' argument that European Lotteries must show it depends on the .LOTTO string, the Determination violates Article 20 of the Procedure and the Standards. Secondly, European Lotteries had expressly indicated, in its letter of 4 July 2013 to the Expert (**Annex 6**), that it wanted to respond[16] to Afilias' misguided allegation that it had failed to prove that the community members need online communication to conduct their business model. In his letter of 8 August 2013, the Expert communicated that he was **not** prepared to allow European Lotteries to file additional submissions (**Annex 7**). In deciding that European Lotteries has *failed to provide evidence on a specific issue* after rejecting European Lotteries' explicit offer to provide additional evidence *regarding the very same issue*, the Expert has inequitably applied Article 17 of the Policy[17] (granting him discretion to allow additional submissions), in violation of Article II, §2 of the ICANN Bylaws[18] and of Article 4 of ICANN's Articles of Association[19]. Astonishingly, the final Determination (**Annex 1**) does not even *mention*

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consequently – without any safeguards for consumers. European Lotteries is *not* a competing gTLD applicant using the objection procedure as a means to obtain strategic advantage over a competing applicant, as is the case in some other gTLD objections.

[16] In the objection of 13 March 2013, European Lotteries had not expressly stated its members depend on the DNS since this is self-evident: lotteries conduct their business in communication with consumers. Nowadays, conducting a consumer-oriented business is simply impossible without using the DNS. European Lotteries did, of course, emphasize its efforts to promote safe and responsible gaming online which necessarily implies dependence on the internet.

[17] "*The Panel may decide whether the parties shall submit any written statements in addition to the Objection and the Response, and it shall fix time limits for such submissions."*

[18] "*ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition."*

[19] This Article requires that ICANN operates in conformity with international law. The Expert's decision to deny European Lotteries an additional round of submissions on, amongst others, one of the issues he deemed decisive

European Lotteries' request for additional submissions and the Expert's letter with the decision not to allow it.

The fifth factor in the Standards is the *"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".* The Determination singles out European Lotteries' arguments on potential trade mark infringements by providing that (§9.29) "*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 which 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".* In Exhibit 17 to the objection (**Annex 2.17**), European Lotteries submitted over 20 trade mark registrations comprising the term 'LOTTO' that are held by its members and Afilias has clearly indicated in the Application (**Annex 2.3**) that it will allow unlicensed operators to register domains in the applied-for gTLD string. Either the Expert has not fully examined the record, or he has erred in his judgment on trade mark infringement. Further still, the most important issue raised by European Lotteries on economic damage was the harm that would be inflicted by unlicensed businesses taking advantage of the implied trust associated with the regulated lotto business. The Determination reads that (§9.31, emphasis added) "*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-*

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to reject the objection is in violation of Article 10 of the Universal Declaration of Human Rights and of Article 6 of the European Convention on Human Rights, both of which aim to ensure the right to a fair trial.

for gTLD string". Here too, the Expert has required proof of **actual** harm rather than a likelihood of detriment. In doing so, he has violated Article 20 of the Procedure and the Standards.

The sixth and final factor in the Standards is the "*level of certainty that alleged detrimental outcomes would occur".* The Determination provides that (§§9.35 and 9.36) "*The Objector submits that there is a significant risk. It does not however produce evidence to support that submission. 9.36 It follows that the Objector has failed to provide a sufficient level of certainty for the alleged detriment".* This finding stands in stark contrast to that of the Panel in re: .BANK[20]. More importantly, it is simply incorrect and it cannot be reconciled with the record of the case. As the Determination acknowledges, the public associates the term 'lotto' with regulated, *i.e.* state-licensed or state-operated lotteries (§8.9). European Lotteries has submitted over fifty (!) declarations of its member lotteries that websites in the .LOTTO space would be perceived by consumers as state-operated, licensed or at least regulated and that the delegation of the gTLD would lead to consumer confusion (Annex 14a to 14tt to the objection, **Annex 2.14**). European Lotteries has also submitted an extensive report by European Parliament on online gambling in the Internal Market (Annex 23 to the objection, **Annex 2.23**) and case law from the European Court of Justice (Annex 20-22 to the objection, **Annex 2.20-22**), all of which acknowledge and prove that there is an increased risk of consumer harm from online gambling. Further, the Determination accepts that there is an

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[20] In re: .BANK (**Annex 12,** §166), the Panel 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*". Similarly, Afilias has no known affiliations with the community of state lotteries. Quite the contrary, its Response to the objection vehemently attacks that community with accusations of "*constant, deliberate and persistent breach of national laws aiming at the protection of minors"* (**Annex 3,** p. 5) and "*illegal monopolies"* (**Annex 3**, p.9-10).

increased risk of illegal and even fraudulent activity in the .LOTTO space (§9.17). In view of this record, the Expert's statement that European Lotteries "*does not produce evidence"* is an error no reasonable person would make. Importantly, the Expert did not state that he is not convinced by the evidence made available by European Lotteries or that he thinks that this evidence is insufficient. He plainly says that European Lotteries does not "*produce evidence"* which either means he has not examined the record or that he chose to ignore the evidence submitted by European Lotteries. Either way, this finding is irreconcilable with Article 20(b) of the Procedure and with Article II, §2 of the ICANN Bylaws.

D. Conclusion

In conclusion, each of the abovementioned aspects of the decision on the requirement of a likelihood of detriment alone comprises or is based on a violation of ICANN Policy and justifies that the decision is reconsidered by the Board Governance Committee. Taken together – since all factors are relevant for the assessment of a likelihood of detriment – it is clear that the decision on a likelihood of detriment in the Determination violates the Procedure, the Standards and ICANN's Bylaws and Articles of Association. By extension, since the Determination found that all other requirements for community objections were met by European Lotteries' objection, the Expert was wrong to reject it. This is not merely a matter of misinterpretation of the evidence submitted to the Expert. The Expert has manifestly erred in applying the Standards and, consequently, the Determination is in violation of the Procedure, the AGB and ICANN's Bylaws and Articles of Association.

9. Requested Remedies

European Lotteries respectfully requests the Board Governance Committee to subject the Determination, in particular its findings regarding detriment, the conclusion, and the decision to reconsideration and to find that these are in violation of ICANN policy. In result,

European Lotteries respectfully requests the Board Governance Committee to order that the findings on Detriment (Section 9, p.15-20), the Conclusion (Section 10, p.20) and the Decision of the ICC Expert Determination of 9 December 2013 in case EXP/422/ICANN/39 must be reversed and, either, to order that the objection by European Lotteries must be sustained, that Afilias' application to operate the gTLD-string .LOTTO must be rejected and that European Lotteries' advance payment of costs shall be refunded by the Centre to European Lotteries; or, alternatively, to order the ICC to appoint an independent expert other than Mr. Clive Duncan Thorne to assess whether the requirement of a likelihood of material detriment is met by European Lotteries' objection.

In subsidiary order, European Lotteries respectfully requests the Board Governance Committee to issue an intermediate decision ordering, on the basis of the openness and transparency requirement enshrined in Article III.1 of the ICANN Bylaws, the International Chamber of Commerce to disclose the draft decision that was provided by Mr. Clive Duncan Thorne pursuant to Article 21 of the Procedure as well as all and any correspondence and documents, including but not limited to documents and correspondence emanating from the ICC Standing Committee and the ICC Secretariat, regarding the scrutiny phase of this draft decision, leading up to the final decision of 9 December 2013. As was mentioned in footnote 5 of this Request, the delay in rendering the decision by the ICC raises substantial concerns as to the process of "scrutiny as to form" by the ICC.

In the event that the Board Governance Committee considers, after a preliminary review of the file, that neither the main request nor the request in subsidiary order can be granted, European Lotteries respectfully requests the Board to order a hearing, by video-conference or otherwise.

10. Grounds for standing and for justification of the requested remedies

European Lotteries has standing to file this Request for Reconsideration as an entity that is adversely affected by the action subject to reconsideration in accordance with Article IV, §2.1 and 2 of the ICANN Bylaws. The harm caused to European Lotteries is explained in **Section 6** of this Request.

As explained sub **Section 8.C**, the grounds for the requested remedies are that the Determination violates ICANN Policy by applying an incorrect Standard to establish a likelihood of harm. In particular, the Determination violates Articles 20 and 21 of the New gTLD Dispute Resolution Procedure, Section 3.5.4 of the gTLD Applicant Guidebook (the Standards), Articles I, §8 and II, §3 of the ICANN Bylaws and Article 4 of the ICANN Articles of Association.

11. Represented parties

This Request for Reconsideration is submitted on behalf of European Lotteries. As an objector in the Community Objection nr. EXP 422 ICANN39, European Lotteries acted in its capacity of umbrella organization representing its members representing a community comprising its members, state-licensed or state-operated lotteries and representing such organisations that are members of World Lottery Association, who endorsed European Lotteries' community objection (see Annex 2 to the objection, **Annex 2.2**).

12. Terms and Conditions for Submission of Reconsideration Requests

European Lotteries accepts the terms and conditions for submission of requests for reconsideration in accordance with Article IV, §2.6 of the ICANN Bylaws.

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board

Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

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 before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

13. Courtesy copies

A courtesy copy of this Request is sent to Mr. Dirk Uwer, counsel for Afilias in the objection proceedings leading to the challenged staff action.

Done in Brussels on 23 December 2013.

For European State Lotteries and Toto Association,

Its counsels:

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CC: Mr. Dirk Uwer, counsel for Afilias Limited

Encl.: List of Annexes

ANNEXES

1	Expert Determination of 9 December 2013
2	2.0. Objection of 13 March 2013 by European Lotteries + Annexes: 2.1. Power of attorney 2.2. Endorsement of objection by World Lottery Association 2.3. Public Portion of .LOTTO gTLD application 2.4. Extract of www.european-lotteries.org re the history of European Lotteries 2.5. Bylaws of European Lotteries 2.6. EU Members of European Lotteries 2.7. Non-EU Members of European Lotteries 2.8. Extract of www.european-lotteries.org on the organization 2.9. Examples of policy initiatives by European Lotteries 2.10. Sample issue of EL Magazine (December 2012 issue) 2.11. European Responsible Gaming Standards (Version 2 May 2012) 2.12. Information on World Lottery Association 2.13. List of members of World Lottery Association 2.14. Individual expressions of oppositions by European Lotteries' members (a-tt) 2.15. Proof of Association of LOTTO/LOTO to lotteries 2.16. Examples of use of the term 'lotto' or 'loto' for state-licensed lotteries 2.17. Examples of EL member trade marks with respect to LOTTO or LOTO 2.18. 2011 ELISE Summary 2.19. Iran GAC Early Warning 2.20. CJEU 8 September 2009, C-42/07, *Liga Portuguesa* 2.21. CJEU 3 June 2010, C-203/08, *Betfair* 2.22. CJEU 8 September 2010, C-46/08, *Carmen Media Group* 2.23. Report of 14 October 2011 on online gambling, 2011/2084/INI 2.24. Proof of payment of 5000 EUR filing fee
3	Response of 13 May 2013 by Afilias

4	ICC Letter of 12 June 2013 (costs + expert appointment)
5	ICC Letter of 3 July 2013 (transfer of the file to Expert)
6	European Lotteries' letter of 4 July 2013 to the Expert requesting an additional round of submissions
7	Expert's Letter of 9 August 2013 rejecting European Lotteries' request
8	GAC Beijing Communique
9	ICC Letter of 10 December 2013 (communication of decision)
10	Hengeler Muëller (counsel for Afilias) press release
11	Decision nr. EXP/384/ICANN/1 in re: .ARCHITECT
12	Decision nr. EXP/389/ICANN/6 in re: .BANK
13	Decision nr. EXP/471/ICANN/88 in re: .SPORT