

1 February 2018

ICANN  
Board Accountability Mechanisms Committee (BAMC)  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536, USA

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

Dear Members of the BAMC,

**Re: Consideration of Next Steps in the Community Priority Evaluation Process Review (Reconsideration Request 16-11)**

We refer to our letter of 16 January 2018 and to the BAMC meeting that was supposed to take place on 17 January 2018. Pursuant to Article 3(5)(c) of ICANN's Bylaws, the preliminary report of said meeting should have been published already. However, no such report was published. It is unclear what steps, if any, the BAMC considered in the CPE process review.

In any event, ICANN confirmed that our letter of 16 January 2018 was going to be provided to the BAMC for consideration. As a follow-up to that letter, Requesters' wish to clarify further their concerns about the CPE process review.

**1. Lack of transparency in ICANN's organisation of the CPE process review**

Despite numerous requests (see letters of 14 June 2017 and of 27 July 2017 on behalf of Requesters), Requesters remain without information as to the selection process for the CPE process reviewer ('FTI Consulting' or 'FTI'), and the names and curricula vitae of the FTI individuals involved in the review.

Requesters are left in the dark about the instructions FTI received from ICANN, either directly or indirectly. Despite Requester's previous demands, ICANN failed to communicate

about the criteria and standards that FTI used to perform the CPE process review. ICANN did not communicate these criteria and standards before the start of the CPE process review, as it should have. And, now that FTI's review is apparently finished, the criteria and standards remain still unclear (cf. *infra*).

## **2. Lack of transparency before, during and beyond the CPE process review**

In addition to the above, Requesters have asked for (i) the disclosure of correspondence between the ICANN organization and the CPE provider, (ii) the content of the interviews made by FTI during the CPE process review, (iii) FTI's engagement letter with ICANN, and (iv) the information requested in our letter of 14 June 2017.

To date, ICANN did not respond to this request.

On 13 December 2017, ICANN published three reports made by FTI on its review of the CPE process. FTI's reports provide little transparency about the requested information.

The first part of FTI's report (Scope 1) aimed at understanding ICANN's involvement in the CPE process. However, FTI offers no transparency about the identity and qualifications of the evaluators who performed the CPE. In addition, FTI's report does not contain the documents or the recordings of the interviews on which its findings are based. FTI fails to provide the questions that were asked during interviews.

Without access to the documents on which FTI based its review, it is impossible for anyone, including the ICANN Board, to assess the weight of FTI's conclusions.

## **3. Lack of diligence and care in the CPE process review**

FTI claims that it examined different data sets of communication between ICANN and the CPE Provider and that it conducted interviews with ICANN personnel and the two remaining evaluators of the CPE Provider.<sup>2</sup> However, FTI recognized that it did not benefit from a complete data set, as the CPE Provider refused to give access to its email communication pertaining to the CPE process.<sup>3</sup> No reason is provided as to why the CPE Provider refused access.

Remarkably, it seems that the vast majority of evaluators had left the CPE Provider before FTI started its review of the CPE process.<sup>4</sup> Yet, FTI did not investigate the reasons for departure. Nor did FTI mention any efforts to contact the evaluators who left the CPE Provider to inquire about ICANN's involvement in the CPE process.

FTI's review of the CPE process was thus extremely limited.

Given its limited scope, no value can be attached to FTI's conclusion in the report that it found no evidence of undue influence of the ICANN organization on the CPE provider.<sup>5</sup>

#### **4. FTI's report reveals a lack of independence of the CPE provider**

As a matter of fact, FTI's report shows a lack of independence of the CPE provider. FTI's Scope 1 report reveals that abundant phone calls were made between the CPE Provider and ICANN.<sup>6</sup> It also mentions that ICANN advised at times that the CPE Provider's conclusions were not supported by sufficient reasoning.<sup>7</sup>

ICANN was thus intimately involved in the evaluation process. The CPE Provider was anything but an independent provider. The abundant phone calls between ICANN and the CPE Provider to discuss "various issues"<sup>8</sup> and ICANN's influence on the CPE Provider's rationale demonstrate that the CPE Provider was not free from external influence from ICANN. As a result, the CPE Provider was not independent.

FTI's attempt to minimize ICANN's influence on the CPE Provider is unconvincing. FTI's report shows (i) that ICANN made extensive comments on the draft reports prepared by the CPE Provider, (ii) that those drafts were discussed at length between the CPE Provider and ICANN, and (iii) that the working of the CPE Provider and ICANN became intertwined to such extent that it became "difficult to discern which comments were made by ICANN organization versus the CPE Provider".<sup>9</sup> It is apparent from the report that FTI was unable to attribute affirmatively specific comments to either ICANN or the CPE Provider.

One can only conclude from these findings that the CPE Provider was not independent from ICANN. Any influence by ICANN in the CPE was contrary to the policy, and therefore undue. FTI's report confirms ICANN's intimate involvement in the CPE and the fact that the *Despegar et al.* IRP Panel was given incomplete and misleading information.

#### **5. FTI fails to analyse the consistency issues of CPE decisions**

The second part of FTI's report (Scope 2) was supposed to focus on the consistency – or better, the lack of consistency – of CPE decisions.

However, FTI's did not *analyse* the consistency issues during CPE. The report simply *sums up* the different reasons that the CPE Provider provided to demonstrate adherence to the community priority criteria. FTI did not examine the consistency between the reasons invoked by the CPE Provider. It also failed to examine whether the CPE provider was consistent in applying those reasons to the different applications. There is no analysis whatsoever as to the inconsistencies invoked by applicants in RfRs, IRPs or other processes.

Emblematic of the lack of analysis is the fact that FTI did not examine the gTLD applications underlying the CPE report. These gTLD applications are not even mentioned among the materials reviewed by FTI.<sup>10</sup> Without reviewing the underlying applications, it is impossible to assess the consistent application of policies and standards.

Specifically with respect to .hotel, the CPE report contains inconsistencies that are readily apparent. To give but one example, the CPE panel determined that the applicant provided for an appeal system, whereas the application does not provide for an appeal system. These inconsistencies and others are left unaddressed in FTI's report.

The fact that those inconsistencies were left unaddressed by FTI is inexcusable. Requesters described the inconsistencies clearly and repeatedly. The *Despegar et al.* IRP Panel considered Requesters' description of those inconsistencies to have merit.<sup>11</sup> The existence of said inconsistencies has never been contested. And FTI's report simply ignores them.

Therefore, we ask you to address these inconsistencies – in the event that you do not simply decide to cancel HTLD's application for the reasons set out in our Reconsideration Request – and to ensure a meaningful review of the CPE regarding .hotel.

This letter is sent without prejudice and reserving all rights.

Yours sincerely,

  
Flip Petillion

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<sup>1</sup> This letter is sent on behalf of Travel Reservations SRL, Minds + Machines Group Limited, Radix FZC, dot Hotel Inc. and Fegistry LLC (Requesters in Reconsideration Request 16-11).

<sup>2</sup> FTI Scope 1 report, pp. 13-15

<sup>3</sup> FTI Scope 1 Report, p. 6.

<sup>4</sup> FTI Scope 1 Report, p. 14.

<sup>5</sup> FTI Scope 1 Report, p. 17.

<sup>6</sup> The report makes mention of weekly conference calls between ICANN and the CPE Provider: FTI Scope 1 Report, p. 14.

<sup>7</sup> FTI Scope 1 Report, p. 12.

<sup>8</sup> FTI Scope 1 Report, p. 12.

<sup>9</sup> FTI Scope 1 Report, pp. 15-16.

<sup>10</sup> FTI Scope 2 Report, pp. 5-9.

<sup>11</sup> *Despegar et al* IRP Declaration, ¶ 146.