

Dotgay's Presentation to the Board Governance Committee

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The EIU Contradicted ICANN's Policies in Evaluating Dotgay's Application

EIU is Bound by the AGB

- **Bylaws, Art. I, § 2(8)**

- “Making decisions by **applying documented policies neutrally and objectively, with integrity and fairness.**”

- **CPE Guidelines, p. 1**

- “The Economist Intelligence Unit (EIU) is committed to evaluating each applicant under the criteria outlined in the AGB. The CPE Guidelines are intended to increase transparency, fairness and predictability around the assessment process.”

- **AGB, Module 1**

- “This Applicant Guidebook is the implementation of the Board-approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period.”

EIU Egregiously Misapplied the AGB (I)

- The EIU **misapplied Module 4.2.3 of the AGB** by failing to truly consider whether the applied for string “matches the name of the community” as the “name by which the community is commonly known by **others.**”
- The EIU **misapplied Module 4.2.3 of the AGB** by failing to consider whether the applied-for string “closely describes **the community**” and not “the community members.”
- The EIU **misapplied Module 4.2.3 of the AGB** by adding a non-established nexus requirement, i.e., by requiring that the name of the community apply to each community member.

EIU Egregiously Misapplied the AGB (II)

- The EIU **misapplied Module 4.2.3 of the AGB** by failing to distinguish the “community” from the “community members”, making clear that the string need not be applied to each community member, but simply “match the community name’ for a score of 3, or alternatively, closely “describe the community” for a score of 2.
- The EIU **misapplied Module 4.2.3 of the AGB** by altering the community endorsement criterion to require that the endorsing organization have community recognition beyond membership.
- The EIU **misapplied Module 4.2.3 of the AGB** by altering the community opposition criterion to include a local community center as an organization of non-negligible size when this community center is merely one out of hundreds of community centers that are members of a global organization that endorsed the Dotgay application.
- The EIU **misapplied Module 4.2.3 of the AGB** in relation to the letter of opposition filed by the Q Center, even though the Center had been influenced by a competing applicant for .GAY, and the EIU should have discounted it as “filed for the purpose of obstruction” within the meaning of the AGB.

EIU is Prohibited from Discriminating

- **Bylaws, Art. II, § 3**

- “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.”

- **CPE Guidelines, p. 22**

- “The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and **non-discrimination**. Consistency of approach in scoring Applications will be of particular importance.”
- *See similarly* CPE Panels and Processes, p. 1; EIU Expression of Interest, p. 5.

EIU Discriminated against Dotgay (I)

- The EIU **discriminated against Dotgay** by requiring that the name of the community apply to each community member when the EIU had found sufficient in other instances that a member self-identify as having a tie to the community. [E.g., .OSAKA]
- The EIU **discriminated against Dotgay** by requiring that the name of the community apply to each community member when the inclusion of other members “not automatically associated with the gTLD” did not prevent the EIU from establishing nexus in other instances. [E.g., .HOTEL and .RADIO]
- The EIU **discriminated against Dotgay** by rejecting the ILGA as a representative organization when the EIU had found in other instances that a community may have more than one such organization. [E.g., .HOTEL and .RADIO]
- The EIU **discriminated against Dotgay** by accepting that a local community center is an organization of non-negligible size when the EIU had found in the instance of the International Radio Emergency Support Coalition that it was not. [E.g., .RADIO]

EIU Discriminated against Dotgay (II)

- The EIU **discriminated against Dotgay** by deeming it had insufficiently representative support despite support from equivalent organizations being sufficient for other community strings:
 - The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) is a global organization dedicated to promoting gay rights composed of over 1,100 member organizations covering countless individuals in 125 countries. It is recognized by the United Nations. [.GAY]
 - The International Hotel & Restaurant Association (IH&RA) is an umbrella trade organization that is composed of national hotel and trade organizations for the hotel and restaurant industries in over 100 countries. It is recognized by the United Nations. [.HOTEL]
 - The World Broadcasting Unions (WBU) is an umbrella organization that is composed of eight regional broadcasting organizations and is dedicated to coordinating international broadcasting. [.RADIO]

EIU's Discriminatory Treatment Denied Dotgay Community Priority Status (I)

- The EIU would have granted Dotgay Community Priority Status had it applied the same standard to .GAY that it applied to other Community Applications with equivalent facts:
 - .OSAKA received the maximum score for nexus despite the fact that the community was identified not only as those who are within the OSAKA geographical area, but those “who self-identify as having a tie to OSAKA, or the culture of OSAKA.” In the case of .GAY, the EIU applied a new and heightened standard for nexus in requiring the name of the community apply to each specific individual or sub-group to that may self-identify and use the applied-for string. It is irrelevant to the analysis that OSAKA is a geographic region.
 - .HOTEL was found to “closely describe the community, without overreaching substantially” despite the fact that the hotel community included entities that “may not be automatically associated with the gTLD,” such as marketing associations. If the same standard had been applied to .GAY, the outcome would have been different. The BGC cannot accept the EIU's conclusion that “more than a small part” of the community would not be automatically associated with .GAY without further due diligence. It is clear that the EIU did not ask the right questions and made no efforts to quantify the part of the community that supposedly is not described as gay.

EIU's Discriminatory Treatment Denied Dotgay Community Priority Status (II)

- .RADIO was found to “closely describe[s] the community, without overreaching substantially beyond the community” despite the EIU acknowledging that “the community, as defined in the application, also includes some entities that are only tangentially related to radio, such as companies providing specific services or products to radio broadcasting organizations.” The EIU further accepted that these companies “would not likely be associated with the word RADIO. However, these entities are considered to comprise only a small part of the community and . . . public will generally associate the string with the community as defined by the applicant.” If the EIU had asked whether the public generally associated the string with the community as defined by the applicant, .GAY would have been as successful as .RADIO.

EIU is Bound to Act Fairly and Openly

- **Bylaws Art. I, § 2(8)**
 - “Making decisions by **applying documented policies [i.e. the AGB] neutrally and objectively, with integrity and fairness.**”
- **Bylaws, Art. III, § 1**
 - “ICANN and its constituent bodies shall operate to the **maximum extent feasible** in an **open and transparent manner** and **consistent with procedures designed to ensure fairness.**”
- **CPE Guidelines, p. 22**
 - “The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. Consistency of approach in scoring Applications will be of particular importance.”
 - *See similarly* CPE Panels and Processes, p. 1; EIU Expression of Interest, p. 5.

EIU Acted Unfairly and Opaquely (I)

- The EIU **ignored the ICC Expert Determination** that found the name of the string .GAY matches Dotgay's definition of the gay community.
- The EIU **did not disclose any due diligence**, including any research, it may have conducted when evaluating the Application **nor did ICANN provide documents from the EIU in response to Dotgay's DIDP Requests.**
- The EIU presented no support for and made no quantification effort to justify its finding that the alleged overreach extends to “more than a small part” of the identified community.

EIU Acted Unfairly And Opaquely (II)

- The EIU **asked only one clarifying question** unrelated to Nexus or Community Support/Opposition Criteria and **thus denied Dotgay the opportunity** to address EIU misunderstandings and mistakes.
- The EIU involved the same personnel in the Second CPE as in the First CPE, raising serious doubts as to who evaluated the application and giving rise to a potential **conflict of interest**.
- ICANN's refusal to disclose the names of the evaluators based on a confidentiality provision is not consistent with **ICANN's and the EIU's transparency obligations**.

The Duties of the Board Governance Committee

The Bylaws Demand the BGC to Ensure Correct Application of the AGB and Correct Finding of Material Facts

- **Bylaws, Art. IV, §2(1)**

“Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction (“Reconsideration Request”) to the extent that he, she, or it have been adversely affected by: (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.”

The Bylaws Demand the AGB to Independently Assess the CPE Report and Make a Recommendation to the Board

- **Bylaws, Art. IV. §2(3)**

“The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to: (a) evaluate requests for review or reconsideration; (b) summarily dismiss insufficient requests; (c) evaluate requests for urgent consideration; (d) conduct whatever factual investigation is deemed appropriate; (e) request additional written submissions from the affected party, or from other parties; (f) make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and (g) make a recommendation to the Board of Directors on the merits of the request, as necessary.”

The Bylaws Demand that the BGC Conduct its Review with Care and Independent Judgment

- Duty to evaluate the due diligence performed by the EIU and independently conduct due diligence as appropriate.
- **Bylaws Art. I, § 2(8)**

“Making decisions by **applying documented policies neutrally and objectively, with integrity and fairness.**”
- **Bylaws, Art. IV, § 3(4)(b)**

“did the Board exercise **due diligence and care** in having a reasonable amount of facts in front of them?”
- **Bylaws, Art. IV, § 3(4)(c)**

“did the Board members exercise **independent judgment** in taking the decision... ?”

IRP Panel Confirmed the BGC's Duty to Review Underlying Facts and Ensure Correct Application of ICANN policies

- *Despegar* IRP Panel, ¶ 69

“The Panel agrees that **if the BGC is charged with considering whether the EIU correctly applied ICANN policies (which ICANN accepts it is), then it needs to look into how the standard was applied.** It is not sufficient to limit the review to the question of whether mention was made of the relevant policy. **The BGC needs to have a reasonable degree of assurance that the EIU has correctly applied the policy.**”

The BGC Must Ensure the Correct Application of the AGB and Correct Finding of Material Facts (I)

- Duty to **correct the EIU's misapplication** of the AGB in requiring the name of the community to apply to each community member in order for nexus to be established.
- Duty to ensure that the EIU determined nexus in **the precise manner** set out in the AGB and by **applying the standard set out in the AGB.**
- Duty to ensure the EIU **does not rewrite the AGB** by requiring support from an organization with “reciprocal recognition on the part of the community members of the organization’s authority to represent them” beyond membership in the organization.
- Duty to ensure the EIU **does not rewrite the AGB** by requiring support from a “single [] organization recognized by all of the defined community’s members as the representative of the defined community in its entirety.”

The BGC Must Ensure Correct Application of the AGB and Correct Finding of Material Facts (II)

- Duty to **independently assess** the Determination of the ICC Expert, which found that the string .GAY matches Dotgay's definition of the gay community.
- Duty to **independently assess** whether a local gay community is an organization of "non-negligible size," particularly when the organization is a member of a global organization that supported the application, and to assess whether its opposition raises serious conflict of interest issues.

The BGC Has the Duty to Ensure Non-Discrimination

- The BGC must ensure **non-discriminatory treatment** by applying the same standard for community support applied by other CPE Panels (e.g., .OSAKA, .HOTEL, .RADIO) for Dotgay.
- **Bylaws, Art. II, § 3**

“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.”
- ***Despegar* IRP Panel, ¶¶ 146-147**

“**ICANN itself has no quality review or control process**The Panel feels strongly that there needs to be a consistency of approach in making CPE evaluations **[T]here needs to be a system in place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators.**”

The BGC Must Ensure Procedural Fairness

- Duty to **ensure fairness in the CPE process** in light of the findings of the ICC Independent Expert that the string .GAY matches Dotgay’s definition of the gay community.
- ***ILGA v. Afilias* Expert Determination, ¶ 13:**

“ILGA's standing has not been doubted by Afilias and is not to be doubted. To have standing the objector has to be an established institution associated with a clearly delineated community (Module 3.2.2.4 of the Guidebook), i.e. with a group that is publicly recognized as a community at a local **and/or** global level and has formal boundaries that enable a determination of what persons or entities form the community (Module 3.5.4 of the Guidebook, first test). **The gay community is a clearly delineated community. It is publicly recognized as such in the language of the media, scholarship, and common usage, formed by millions of individuals whose gender identities and sexual orientations are outside of the societal norms for heterosexual behavior** and who, whether they are more or whether they are less organized, share the awareness of their special status. During the last century, the gay community has grown out of individuals with that special awareness into a community in its own right and is now a worldwide presence.”

ICANN Has a Duty to Foster Diversity and Safety of the Internet Community

- **Articles of Incorporation, Art. IV**

“The Corporation shall operate **for the benefit of the Internet community as a whole**”

- **Bylaws Art. III, § 1**

“Seeking and supporting broad, informed participation reflecting the ***functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.***”

The Denial of a .GAY Community gTLD will Undermine Diversity and Public Interest

- ICANN has a **positive obligation to foster diversity** on the Internet. The Community gTLD program is an attempt to fulfil that obligation.
- This includes ensuring vulnerable and deserving communities are empowered and protected in the public interest.
- Dotgay is the **only applicant** for the **.GAY gTLD with Public Interest Commitments**, including:
 - Pledging to provide a minimum of **67% profits** from domain name registrations to a separate foundation to support gay community initiatives.
 - Appropriate **Authentication Policies** to ensure community-appropriate material.
 - Reserving key domain names as a community resource and support websites: **Rights.gay; HIV.gay; Safe.gay; Suicide.gay; Health.gay; Ally.gay; Transgender.gay, Lesbian.gay; Queer.gay; Pride.Gay.**

The Bylaws and Articles Demand That the BGC Ensure Transparency

- **Articles of Incorporation, Art. IV**

“The Corporation shall operate for the benefit of the Internet community . . . **through open and transparent processes**”

- **Bylaws Art. III, § 1**

“ICANN and its constituent bodies shall operate to the **maximum extent feasible** in an **open and transparent manner** and **consistent with procedures designed to ensure fairness.**”

IRP Panel and ICANN Board Confirmed Transparency Duty

- *Despegar* IRP Panel, ¶ 145

“The Panel invites the Board to affirm that, to the extent possible, and compatible with the circumstances and objects to be achieved by ICANN, transparency and administrative due process should be applicable.”

- **Board Resolution dated 19 March 2016**

“Board accepts the findings of the Panel’s Final Declaration . . . The Board also affirms that ICANN, as appropriate, will continue to ensure that its activities are conducted through open and transparent processes”

The BGC Must Ensure Transparency

- EIU and ICANN staff **have not disclosed** the underlying materials from the EIU analysis.
- The EIU withheld documents from both the BGC and Dotgay, preventing Dotgay from knowing how its Application was treated and the BGC from independently reviewing whether the principles of fairness and non-discrimination were satisfied.