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4 December 2013

ATTN: Bruce Tomkin  
Chair, ICANN Board Governance Committee  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536  
USA  
**Sent by email to reconsideration@icann.org**

**Re: Request for Reconsideration based on ICANN's inaction in the course of Community Objection proceedings (case ICC EXP/385/ICANN/2 & c. EXP/447/ICANN/64).**

Dear Sir,

Please find attached a Reconsideration Request submitted on behalf of HOTREC.

This Reconsideration Request is submitted to you in your capacity as chair of the ICANN Board Governance Committee (BGC), within the 15-day deadline allowed to submit such a request.

As a preliminary remark, HOTREC is not seeking to appeal a third-party DRSP (i.e. Expert Determination of 19 November 2013 in the consolidated case ICC EXP/385/ICANN/2 & ICC EXP/447/ICANN/64) and/or to obtain the cancellation of the corresponding proceedings. The Expert determination of 19 November 2013 referred to by HOTREC in its Reconsideration Request should only be viewed as the final stage of ICANN's inaction in the course of the corresponding Community Objection proceedings.

Indeed, the present Reconsideration Request is well being submitted as a reconsideration of a "Board action/inaction".

While HOTREC was fundamentally pleased with ICANN's decision on 25 June 2013 directing ICANN staff to *"to defer moving forward with the contracting process for applicants seeking to impose exclusive registry access for "generic strings" to a single person or entity and/or that person's or entity's Affiliates (as defined in Section 2.9(c) of the Registry Agreement), pending a dialogue with the GAC"*, it is HOTREC's view that ICANN failed to take appropriate action subsequent to this decision, i.e. ICANN should have decided to stay all the pending objection proceedings and to instruct the ICC accordingly.

We are more than convinced that this Reconsideration Request meets the requirements defined by ICANN. Should the BGC consider that the Reconsideration Request is not the appropriate procedure, we invite the BCG to inform us which jurisdiction should handle our case. According to the general principle of laws, and in particular fundamental rights such as the right to a fair trial, HOTREC should have the possibility to submit its present claim to ICANN.

Yours sincerely,

A handwritten signature in black ink, consisting of a horizontal line with a vertical stroke intersecting it near the right end, and a small dot at the end of the horizontal line.

Nathalie Dreyfus

## Reconsideration Request Form

Version of 11 April 2013

### 1. Requester Information

Name: HOTREC

Address: Contact Information Redacted

Email: Contact Information  
Redacted

C/O:

Name: Dreyfus & associés

Address: 78 avenue Raymond Poincare, 75116 Paris, France

Email: contact@dreyfus.fr

Phone Number (optional): +33.144700704

### 2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

HOTREC is challenging ICANN's inaction in not stopping or at least suspending the Community Objections proceedings involving applications listed in the GAC Beijing Communique of 11 April 2013, Annex I Safeguards on New gTLDs, Category 2, section 2, "Exclusive Access", and more particularly the Community Objection filed by HOTREC against Booking.com's application for .HOTELS as a closed/exclusive access gTLD (Case No. EXP/447/ICANN/64):

- HOTREC's Community Objection was filed against Booking.com's .HOTELS application as a **closed** gTLD ("exclusive access");
- However, as pointed by the Expert herself in her Decision dated 19 November 2013, "*considerable doubt arose in the course of the proceedings as to whether the Applicant would be able to operate '.HOTELS' as **closed** gTLD, as it has proposed*"; (Cf. Paragraph [...] below for details of events which led to this new situation);
- Since the very subject matter of the Community Objection filed by HOTREC (operation of a TLD on an **exclusive access** registry) was seriously put into question by ICANN itself, the Board should have taken the appropriate measures to avoid that the parties continue proceedings based on an outdated Application which would most probably not be approved as such by ICANN;

ICANN's lack of action at the time (a) forced the parties to continue pointless proceedings, (b) forced the parties to bear the corresponding significant expenses; and more importantly, (c) led to a breach of due process since (i) HOTREC was not given the opportunity to object Booking.com's Application in its final version and (ii) the Expert had to make her determination on the basis of non-reliable facts. In light of the foregoing, HOTREC requests that ICANN:

- Reconsiders and reinstates new Community Objection proceedings for all Applications that were listed in the GAC Beijing Communiqué, once corresponding Applicants – like Booking.com – submit their changes;
- Reimburses HOTREC for all of its expenses (administrative fees, Expert fees, lawyer's fees) in relation to Case No. EXP/447/ICANN/64;
- If no reimbursement takes place, decides and ensures that the new Community Objection proceedings will be available to HOTREC at no cost of any nature whatsoever.

4. Date of action/inaction:

The Expert determinations which represent the final stage of ICANN's inaction in the proceedings were published on 25 November 2013

(<http://newgtlds.icann.org/en/program-status/odr/determination>).

5. On what date did you become aware of the action or that action would not be taken?

The Expert determinations were communicated to HOTREC and the Applicant on 19 November 2013 (Annex 1).

6. Describe how you believe you are materially affected by the action or inaction:

HOTREC is a non-profit international association headquartered in Brussels, Belgium, which brings together 44 national associations representing the interest of the hospitality industry in 27 countries. HOTREC filed a Community Objection against Booking.com B.V. with the support not only of its members, but also numerous hospitality stakeholders all around the world and international organizations (Annex 2).

HOTREC filed a Community Objection against Booking.com's HOTELS Application on 13 March 2013.

On 19 November 2013, the Expert, Mrs. Kirby, dismissed HOTREC's Community Objection basing its determination on the grounds of hypothetical or future events. The Expert was in fact referring to the ICANN decision to modify the new gTLD program framework with:

- The addition and later modification of Specification 11 of the Registry Agreement of 2 July 2013, and

- The Application change request applicable to Booking.com as required by ICANN on 9 October 2013 (<http://newgtlds.icann.org/en/announcements-and-media/announcement-4-09oct13-en>).

HOTREC suffered direct financial harm in that in order to file and then pursue the Objection proceedings, it had to pay administrative and Expert fees in addition to lawyer's fees; being noted the Expert found in favor of Booking which prevented HOTREC from obtaining any sort of refund.

HOTREC also suffered indirect financial harm in that it had to lead studies on the effect and consequence of an exclusive access registry for .HOTELS as well to rally all of its members and more generally inform the international Hospitality Community on the dangers of Booking.com's Application for HOTELS.

HOTREC is also materially affected by the fact that it has suffered a breach of due process in that it was forced to continue Community Objection proceedings against an application on which ICANN had required significant changes; as a consequence, the Expert Determination of 19 November 2013 is devoid of interest and one should consider that, at this stage, HOTREC has not had yet the opportunity to assess Booking.com's application and therefore decide on the opportunity to file an objection or not.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

HOTREC is also affected by the inaction of ICANN in the Community Objection against HOTEL Application from Despegar Online, s.r.l. - Objection ICC EXP/386/ICANN/3 (c. EXP/445/ICANN/62) although as far as these proceedings are concerned, the Expert accepted to suspend them (with the agreement of Despegar Online, s.r.l.).

HOTEL CONSUMER PROTECTION COALITION (HCPC) is directly concerned by the same inaction as HCPC filed four Community Objections respectively against Booking.com's HOTELS Application and Despegar Online's HOTEL, HOTELES and HOTEIS Applications. Furthermore, the Expert rendered a similar determination rejecting HCPC's Community Objection ref. ICC EXP/385/ICANN/2.

Any other third party who filed Community Objections against "Closed generic" TLD Applications may also be affected by ICANN's inaction.



## 8. Detail of Board or Staff Action – Required Information

All Objection proceedings started on 13 March 2013.

On 10 April 2013, the Board established the New gTLD Program Committee (NGPC) and delegated to the Board New gTLD Program Committee all legal and decision making authority of the Board relating to the New gTLD Program (<http://www.icann.org/en/groups/board/documents/resolutions-10apr12-en.htm>).

On 11 April 2013, the GAC published its Beijing Communique establishing safeguards applicable to all New gTLDs and sorting safeguards by categories. In Category 2, Restricted Registration Policies, the GAC advised the ICANN Board that *“For strings representing generic terms, exclusive registry access should serve a public interest goal”* and gave a non-exhaustive list of strings that it considered to be generic terms, where the applicant was proposing to provide exclusive registry access. This list included the term HOTELS for which Booking.com was the sole applicant. Said Application was subject to two Community Objections.

On 23 April 2013, more than one month after the Community Objection proceedings started, ICANN opened a Public Comment period seeking for community input as to how ICANN should address this GAC advice.

On 24 June 2013, Mrs Kirby was appointed as Expert in the HOTELS Community Objection proceedings.

On 25 June 2013, ICANN published on its website "Approved Resolutions | Meeting of the New gTLD Program Committee". These resolutions included inter

alia *"the NGPC adopts the "Proposed PIC Spec Implementation of GAC Category 2 Safeguards" (20 June 2013) [...] to accept and implement the GAC's Category 2 Safeguard Advice for applicants not seeking to impose exclusive registry access" and "the NGPC directs staff to defer moving forward with the contracting process for applicants seeking to impose exclusive registry access for "generic strings" to a single person or entity and/or that person's or entity's Affiliates (as defined in Section 2.9(c) of the Registry Agreement), pending a dialogue with the GAC."*

On 1 July 2013, having noted that ICANN had not drawn the conclusions on the pending objection proceedings of the decision *"to defer moving forward with the contracting process for applicants seeking to impose exclusive registry access for "generic strings" to a single person or entity and/or that person's or entity's Affiliates (as defined in Section 2.9(c) of the Registry Agreement), pending a dialogue with the GAC"*, and therefore suspended such proceedings, HOTREC requested a stay of the HOTELS Community Objection proceedings before the ICC.

On 3 July 2013, the NGPC approved the form of the New gTLD Registry Agreement and authorized ICANN staff to take all necessary steps to implement it and to move forward with the implementation of the New gTLD Program.

On 9 October 2013 (updated on 25 October) Applicant Responses to GAC Category 2 Advice were published. The NGPC stated that:(<http://newgtlds.icann.org/en/announcements-and-media/announcement-4-09oct13-en>)

- *"Applicants of 35 applications indicated that their applications currently state that the applied-for TLDs will be operated as exclusive access registries, but the applicants will not operate them as exclusive access registries."*
- *"Applicants of the 35 applications mentioned above will be asked to submit a change request to align their applications and intent. Once an application change request has been approved by ICANN and the application becomes eligible, these applicants will be invited to the Contracting process in order of priority number."*

Booking.com's application for HOTELS is included in this set of applications.

On 19 November 2013, the Expert, Mrs. Kirby, rendered her determination and rejected HOTREC Community Objection. The Expert especially stated, in her assessment of the likelihood of material detriment that:

*"The Objector has similarly failed to prove any likely material detriment to the Hotel Community flowing from the Applicant's proposal to operate ".HOTELS" as a closed gTLD. In this regard, I note that the Objector itself has pointed out that, since it filed its Objection, Specification 11 of the draft New gTLD Registry Agreement has been revised. See Objector's email dated 9 August 2013. Specifically, paragraphs 3(c) and 3(d) of that Specification now provide in pertinent part as follows:*

*(c) Registry Operator will operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by*

*establishing, publishing and adhering to clear registration policies.*

*(d) Registry Operator of a “Generic String” TLD may not impose eligibility criteria for registering names in the TLD that limit registrations exclusively to a single person or entity and/or that person’s or entity’s “Affiliates” [ . . .].*

*“Generic String” means a string consisting of a word or term that denominates or describes a general class of goods, services, groups, organizations or things, as opposed to distinguishing a specific brand of goods, services, groups, organizations or things from those others.*

*Draft New gTLD Registry Agreement dated 2 July 2013. As the Objector has noted, these provisions cast considerable doubt on whether the Applicant would be able to operate “.HOTELS” as a closed gTLD, as it has proposed. See Objector’s email dated 9 August 2013. It is accordingly far from certain that the Applicant would be able to exclude members of the Hotel Community from registering domain names in “.HOTELS” and cause the alleged detriment the Objector foresees.*

As of today, Booking.com has not submitted any change request to its application.

A detailed timeline is provided in Annex 3.

HOTREC would like to point out that:

1. The Board of ICANN or the NGPC established by the Board at its 10 April 2012 meeting has continuously considered inputs related to “closed-generic” TLDs Application from the GAC and the Community and taken decisions modifying the conditions under which such TLDs can be operated, up to a change of the Registry Agreement and demanding Applicants to submit Public Interest Commitments and/or change their Application;
2. The Board of ICANN or the NGPC have at no time assessed the consequences of their decisions on ongoing proceedings;
3. The Board of ICANN or the NGPC have not suspended the ongoing proceedings, despite the fact that Applications objected were to be substantially amended;
4. In doing so, the Board of ICANN or the NGPC
  - a. Prevented HOTREC from assessing, during the course of the proceedings, Booking.com’s Application in its amended version; ;
  - b. Therefore, prevented HOTREC from amending or withdrawing its Community Objection after the assessment of the amended Application;
  - c. Let the Experts render decisions based on hypothetical or future facts;
  - d. Forced HOTREC and its members to incur useless significant costs.

**HOTREC considers the Board of ICANN, by its actions modifying the Application framework on the one hand, and by its inaction to evaluate and to draw conclusions of its actions on on-going proceedings on the other hand, violated Article 4 of the Articles of Incorporation and Article I, Section 2, 7, 8 and 9 of the Bylaws of ICANN and was the cause of a breach of due process in this legal proceedings.**

9. What are you asking ICANN to do now?

HOTREC requests that ICANN:

- Reconsiders and reinstates new Community Objection proceedings for all Applications that were listed in the GAC Beijing Communiqué, Annex I Safeguards on New gTLDs, Category 2, section 2, “Exclusive Access”, once corresponding Applicants – like Booking.com – submit their changes;
- Reimburses HOTREC for all of its expenses (administrative fees, Expert fees, lawyer’s fees) in relation to Case No. EXP/447/ICANN/64.

If no reimbursement takes place, decides and ensures that the new Community Objection proceedings will be available to HOTREC at no cost of any nature whatsoever.

10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

The general principles of law define and frame the right to a fair trial. Said general principles of law applies to any ICANN's decision:

- The Universal Declaration of Human Rights included in the United Nations Charter (<http://www.un.org/en/documents/udhr/>) states in Article 10 that:  
*“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.*
- The European Convention on Human Rights reads as follow in Article 6:  
*“[...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [...]”*
- The Fifth Amendment to the United States Constitution, part of the Bill of Rights, contains a similar provision *“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”*

The European Court of Human Rights (ECHR) provides a detailed guidance in its “Guide on Article 6, Right to a fair Trial”

(<http://www.echr.coe.int/Documents/GuideArt6ENG.pdf>).

### ***1. Breach of Adversarial proceedings***

The concept of a fair trial comprises the fundamental right to adversarial proceedings. The right to adversarial proceedings means to have knowledge of and comment on all evidence adduced or observations filed. The right to adversarial proceedings must be capable of being exercised in satisfactory conditions. A party to the proceedings must have the possibility to familiarize itself with the evidence, as well as the possibility to comment on its existence, contents and authenticity in an appropriate form and within an appropriate timeframe if necessary by obtaining a stay of the proceedings.

The procedure continued while the Board of ICANN was discussing openly the possibility to change the challenged Booking.com’s Application from closed to open registry. As of today, Booking.com has not submitted the mandatory change to the Application requested by ICANN. HOTREC was not in a position to have access to the final version of Booking.com’s Application. Thus, HOTREC was not given the opportunity to comment on said document, which is crucial in this Community Objection.

**Accordingly, HOTREC considers the adversarial principle has been violated.**



## ***2. Breach of Equality of arms***

The principle of “equality of arms” is inherent in the broader concept of a fair trial. Equality of arms implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis the other party.

The Expert, Mrs. Kirby, considered that the amended version of the Specification 11 of the Registry Agreement prohibited the “closed generic” TLDs and that Booking.com would operate an unrestricted TLD, without knowledge of the HOTELS Application change to be submitted by Booking.com. The Expert almost took this fact as granted while no final decision has been taken by ICANN yet. The Expert even used this argument against HOTREC in her determination to mitigate the likelihood of material detriment.

**Accordingly, HOTREC considers the principle of “equality of arms” has been violated.**

## ***3. Breach in Administration of evidence.***

The proceedings have to be fair in the way evidence is submitted to the parties. It is the Expert’s task to ascertain whether the proceedings as a whole were fair, including the way in which evidence was taken. The Expert must therefore establish whether the evidence was presented in such a way as to guarantee a fair trial.

The Expert, Mrs. Kirby, has rendered her determination based on hypothetical and future facts, using elements provided by HOTREC against it and denying it any possibility to correct ungrounded affirmations. These unfounded affirmations were also based on the hypothetical application of the amended Specification 11 of the Registry Agreement to Booking.com's HOTELS Application.

**Accordingly, HOTREC considers the principle of "fairness in the proceedings" has been violated.**

The combination of actions resulting from the Board of ICANN implementing the provision included in Beijing GAC Advice, Annex I Safeguards on New gTLDs, Category 2, section 2, "Exclusive Access", with the inaction of the Board of ICANN in assessing the consequences of its actions has led Mrs. Kirby to render a decision on erroneous grounds. Furthermore, the lack of guidance from ICANN prevented the Center (ICC) to suspend the pending proceedings.

The Expert refused to stay the proceedings and/or asked the parties to complete their submissions in light of this new event. In the end, it was ICANN's responsibility to stay all objection proceedings against "closed generic" TLD Applications while the issue was being decided.

#### **Violation of ICANN Articles of Incorporation**

ICANN is supposed to operate for the benefit of the Internet community as a whole, **carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law**

and, to the extent appropriate and consistent with its Articles and Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets (Article 4 of ICANN Articles of Incorporation).

HOTREC has demonstrated a breach of fair trial and in particular a breach of adversarial proceedings, a breach of equality of arms and a breach in administration of evidence, according to the principles of international law.

**HOTREC considers ICANN did not comply with the principles of international law. As a result, the Board violated Article 4 of ICANN ARTICLES OF INCORPORATION.**

### **Violation of Bylaws of ICANN**

ICANN has established its Bylaws on a set of core values that should guide its decisions and actions, including

- Employing open and transparent policy development mechanisms that (i) **promote well-informed decisions** based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process. (Bylaws Art. I, Section 2, 7)).
- **Making decisions** by applying documented policies neutrally and objectively, **with integrity and fairness**. (Bylaws Art. I, Section 2, 8)).

- **Acting with a speed that is responsive to the needs of the Internet** while, as part of the decision-making process, obtaining informed input from those entities most affected. [...]”. (Bylaws Art. I, Section 2, 9))

Either if the Board of ICANN and the NGPC have largely communicated on their websites on the “closed-generic” matters, they have never informed the ICC nor the Expert of the consequences of their decisions. They failed in their duty to promote well-informed decisions, violating its bylaws Art. I, Section 2, 7.

As stated above, it appears that the combination of actions/inaction related to “closed-generic” TLD Applications misled the Expert in rendering her determination and led to an unfair determination. Bylaws Art. I, Section 2, 8 are therefore violated.

Nine months have elapsed from the start of the objection procedure to the decision of the Expert. During these nine months, the Board of ICANN has not seen fit to inform the ICC of its decisions and their consequences, nor has it taken a decision on the suspension of proceedings. It is difficult to regard the Board as acting with a speed that is responsive to the needs of the Internet. Thus, the Board has violated its bylaws Art. I, Section 2, 9.

**Consequently, HOTREC considers the Board violated Article I, Section 2, 7, 8 and 9 of ICANN BYLAWS.**

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

*Not Applicable*

Do you have any documents you want to provide to ICANN?

If you do, please attach those documents to the email forwarding this request.

Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

#### Terms and Conditions for Submission of Reconsideration Requests

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.

Signature

A handwritten signature consisting of a horizontal line on the left, a vertical line in the middle, and another horizontal line on the right, all connected together.

Date: 4 December 2013