

ICANN BOARD SUBMISSION NO. 2016.03.10.2a-CLEAN-Rev 1

TITLE: **Consideration of Independent Review Panel’s Final Declaration in the .ECO and .HOTEL IRPs**

PROPOSED ACTION: **For Board Consideration and Approval**

EXECUTIVE SUMMARY:

On 12 February 2016, the Independent Review Process (IRP) Panel (Panel) issued its Final Declaration in the consolidated IRPs relating to .HOTEL and .ECO (see [Final Declaration](#), Attachment A to Reference Materials). Both IRPs challenged the Community Priority Evaluation (CPE) Panel Reports finding that the community applications for those strings prevailed in CPE and challenged the BGC’s denial of the Reconsideration Requests submitted by the IRP claimants (Requests 14-34, 14-39, and 14-46).

In a unanimous decision, the Panel “concluded that ICANN is the prevailing party, both in respect of the .hotel IRP and the .eco IRP.” (*Id.* at ¶ 154.) The Panel declared that “the BGC acted consistently with the provisions of ICANN’s Articles of Incorporation and Bylaws, and that the Claimants’ complaints have not been made out.” (*Id.* at ¶ 151.)

Although the Panel ruled in ICANN’s favor and denied the .ECO and .HOTEL IRPs, the Panel did make some important observations and suggestions for the Board’s consideration. In particular, while recognizing that the New gTLD Program is near its end “and there is little or nothing that ICANN can do now,” the Panel suggested that a system be put in place to ensure that CPE evaluations are conducted “on a consistent and predictable basis by different individual evaluators,” and to ensure that ICANN’s core values “flow through...to entities such as the EIU.” (*Id.* at ¶¶ 147, 150.) The Panel also noted that ICANN staff could have better explained its determination that certain requested documents were subject to the Defined Conditions for Nondisclosure in the Documentary Information Disclosure Policy (DIDP). (*See id.* at ¶ 110.) The Panel also suggested that, to the extent possible, and depending on the circumstances in making a

decision (*see id.* at ¶ 145), the Board affirm that ICANN carries out its activities “through open and transparent processes” pursuant to Article IV of ICANN’s Articles of Incorporation. In addition, the Panel encouraged ICANN to respond to a letter from the claimants in the .HOTEL IRP regarding the portal configuration issue as soon as feasible. (*Id.* at ¶ 134.)

In accordance with Article IV, section 3.21, the Board is being asked to consider and adopt the findings of the Panel’s Final Declaration in the .ECO and .HOTEL IRPs. (*See* <https://www.icann.org/resources/pages/governance/bylaws-en/#IV>.)

PROPOSED RESOLUTION:

Whereas, on 12 February 2016, an Independent Review Process (IRP) Panel (Panel) issued its Final Declaration in the IRPs relating to .HOTEL and .ECO.

Whereas, the Panel declared ICANN to be the prevailing party in both IRPs, and, among other things, declared that the Board’s actions or inactions did not in any way violate ICANN’s Articles of Incorporation or Bylaws. (*See* Final Declaration, ¶¶ 151-156, <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>.)

Whereas, while the Panel declared ICANN to be the prevailing party in both the .HOTEL and .ECO IRPs, the Panel also suggested that: (1) the Board consider additional measures be added in the future to increase the consistency and predictability of the CPE process and third-party provider evaluations; (2) the Board encourage ICANN staff to be as specific and detailed as possible in responding to requests made pursuant to ICANN’s Documentary Information Disclosure Policy (DIDP); (3) the Board affirm, when appropriate, that ICANN’s activities are conducted through open and transparent processes in conformance with Article IV of ICANN’s Articles of Incorporation; and (4) the Board respond to a letter from the .HOTEL Claimants regarding the portal configuration issue as soon as feasible.

Whereas, in accordance with Article IV, section 3.21 of ICANN’s Bylaws, the Board has considered the Panel’s Final Declaration.

Resolved (2016.03.XX.XX), the Board accepts the following findings of the Panel's Final Declaration: (1) ICANN is the prevailing party in the *Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, and Radix FZC v. ICANN* IRP; (2) ICANN is the prevailing party in the *Little Birch, LLC and Minds + Machines Group Limited v. ICANN* IRP; (3) the IRP Panel's analysis is limited to declaring whether the Board has acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws; (4) the Board (including the Board Governance Committee) acted consistently with the Articles of Incorporation and Bylaws; (5) the parties shall each bear their own expenses including legal fees; and (6) the IRP costs shall be divided between the parties in a 50% (claimants) / 50% (ICANN) proportion.

Resolved (2016.03.XX.XX), the Board notes the Panel's suggestions, and: (1) directs the President and CEO, or his designee(s), to ensure that the New gTLD Program Reviews take into consideration the issues raised by the Panel as they relate to the consistency and predictability of the CPE process and third-party provider evaluations; (2) encourages ICANN staff to be as specific and detailed as possible in responding to DIDP requests, particularly when not disclosing requested documents; (3) affirms that, as appropriate, ICANN will continue to ensure that its activities are conducted through open and transparent processes in conformance with Article IV of ICANN's Articles of Incorporation; and (4) directs the President and CEO, or his designee(s), to complete the investigation of the issues alleged by the .HOTEL Claimants regarding the portal configuration as soon as feasible and to provide a report to the Board for consideration following the completion of that investigation.

PROPOSED RATIONALE:

Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, and Radix FZC (collectively, ".HOTEL Claimants") filed a request for an Independent Review Process (IRP) challenging the Community Priority Evaluation (CPE) Panel Report finding that the one community application for .HOTEL prevailed in CPE (the ".HOTEL IRP"). Specifically, the .HOTEL Claimants filed Reconsideration Request 14-34 seeking reconsideration of the CPE Panel Report, and Reconsideration Request 14-39

seeking reconsideration of ICANN staff's determination, pursuant to the Documentary Information Disclosure Policy (DIDP), that certain documents related to the CPE Panel Report were not appropriate for disclosure under the DIDP Defined Conditions for Nondisclosure. The Board Governance Committee (BGC) denied Reconsideration Requests 14-34 and 14-39, finding that the .HOTEL Claimants had not stated proper grounds for reconsideration. The .HOTEL IRP challenged the denial of Reconsideration Requests 14-34 and 14-39, and argued that the Board should have take further action with respect to the CPE Panel Report.

Little Birch LLC and Minds + Machines Group Limited (collectively, “.ECO Claimants”) filed an IRP Request challenging the CPE Panel Report finding that the one community application for .ECO prevailed in CPE (the “.ECO IRP”). Specifically, the .ECO Claimants filed Reconsideration Request 14-46, seeking reconsideration of the CPE Panel Report. The BGC denied Reconsideration Request 14-46, finding that the .ECO Claimants had not stated proper grounds for reconsideration. The .ECO IRP challenged the denial of Reconsideration Request 14-46, and alleged that ICANN “has failed to act with due diligence and failed to exercise independent judgment” in “adopting” the CPE Panel Report, and requested that ICANN be “required to overturn the CPE in relation to .eco and allow the .ECO Claimants’ applications to proceed on their own merits.”

On 12 May 2015, the .HOTEL and the .ECO IRPs were consolidated under a single IRP Panel (Panel). The Panel held a telephonic hearing on 7 December 2015. On 12 February 2016, the three-member Panel issued its Final Declaration. After consideration and discussion, pursuant to Article IV, Section 3.21 of the ICANN Bylaws, the Board adopts the findings of the Panel, which are summarized below, and can be found in full at <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>.

The Panel found that the “analysis, which the Panel is charged with carrying out in this IRP, is one of comparing the actions of the Board with the Articles of Incorporation and Bylaws, and declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.” (Final Declaration at ¶ 58.)

Using the applicable standard of review, the Panel found that: (1) ICANN is the prevailing party in the *Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, and Radix FZC v. ICANN* IRP; (2) ICANN is the prevailing party in the *Little Birch, LLC and Minds + Machines Group Limited v. ICANN* IRP; (3) the Board (including the Board Governance Committee) acted consistently with the Articles of Incorporation and Bylaws; (4) the parties shall each bear their own expenses including legal fees; and (5) the IRP costs shall be divided between the parties in a 50% (claimants) / 50% (ICANN) proportion. (See Final Declaration at ¶¶ 151, 154-156, 160.)

More specifically, the Panel found that the .HOTEL IRP “was always going to fail given the clear and thorough reasoning adopted by the BGC in its denial” of Reconsideration Requests 14-34 and 14-39. (Final Declaration at ¶ 155.) And, “[a]s for the .eco IRP, it is clear that the Reconsideration Request [14-46] was misconceived and was little more than an attempt to appeal the CPE decision. Again, therefore, the .eco IRP was always going to fail.” (Final Declaration at ¶ 156.)

It should be noted that, while ruling in ICANN’s favor and denying both IRPs, the Panel did make some observations and suggestions for the Board’s consideration. In particular, while recognizing that the New gTLD Program is near its end “and there is little or nothing that ICANN can do now,” the Panel suggested that a system be put in place to ensure that CPE evaluations are conducted “on a consistent and predictable basis by different individual evaluators,” and to ensure that ICANN’s core values “flow through...to entities such as the EIU.” (*Id.* at ¶¶ 147, 150.) The Panel also noted that ICANN staff could have better explained its determination that certain requested documents were subject to the Defined Conditions for Nondisclosure in the Documentary Information Disclosure Policy (DIDP). (*Id.* at ¶ 110.) The Panel also suggested that “to the extent possible, and compatible with the circumstances and the objects to be achieved by ICANN” in taking a particular decision (*Id.* at ¶ 145), the Board affirm that ICANN carries out its activities “through open and transparent processes” pursuant to Article IV of ICANN’s Articles of Incorporation. In addition, the Panel encouraged ICANN to respond to a letter from the .HOTEL Claimants regarding the portal configuration issue as soon as feasible. (*Id.* at ¶ 134.)

The Board acknowledges the foregoing suggestions by the Panel. The Board has considered the suggestions and notes that it will ensure that the New gTLD Program Reviews take into consideration the issues raised by the Panel as they relate to the consistency and predictability of the CPE process and third-party provider evaluations. The Board also affirms that ICANN, as appropriate, will continue to ensure that its activities are conducted through open and transparent processes in conformance with Article IV of ICANN's Articles of Incorporation. The Board also encourages ICANN staff to be as specific and detailed as possible in responding to DIDP requests, particularly when determining that requested documents will not be disclosed. In this regard, the Board notes that the Cross Community Working Group (CCWG) on Enhancing ICANN Accountability has identified that reviewing and enhancing the DIDP is one of the topics that it will address in Workstream 2. This work, which will be further framed starting at the ICANN55 meeting in Marrakech, is likely to include review of the scope of the DIDP Defined Conditions for Nondisclosure.

Finally, with respect to the Panel's recommendation that ICANN respond to a letter from the .HOTEL Claimants regarding the portal configuration issue as soon as feasible, the Board notes that staff has informed the Board that it is nearing the end of its investigation of this matter. The Board is recently in receipt of two letters from Claimants regarding the portal configuration issue, dated 1 March 2016 and 8 March 2016, respectively. Staff has provided the Board with an update of its investigation into the issues set forth in the letters. The Board has directed the President and his CEO, or his designee(s) to complete its investigation into this matter as soon as feasible. The Board notes that out of a matter of equity and fairness, the investigation should include the opportunity for all relevant parties to be heard. The Board expects that staff will prepare a report for the Board following the completion of its investigation, at which time the Board will consider the .HOTEL Claimants request for cancellation of HOTEL Top-Level Domain S.a.r.l.'s application for .HOTEL.

As required, the Board has considered the Final Declaration. As this Board has previously indicated, the Board takes very seriously the results of one of ICANN's long-standing accountability mechanisms. Accordingly, and for the reasons set forth in this

Resolution and Rationale, the Board has accepted the Panel's Final Declaration as indicated above. Adopting the Panel's Final Declaration will have no direct financial impact on the organization and no direct impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative function that does not require public comment.

Submitted By: Amy A. Stathos, Deputy General Counsel
Date Noted: 9 March 2016
Email: amy.stathos@icann.org