

DotGay's Presentation

I. Introduction

Good morning. I am Erica Franzetti, from Dechert, and I appreciate the opportunity to speak to you on behalf of our client, Dotgay. Our firm is representing Dotgay on a pro bono basis and that's because we believe that the EIU made fundamental mistakes in its evaluation of Dotgay's application for community priority status.

We hope that you received the materials we sent you via email, which included a power point presentation. The first slides of the power point specify the EIU actions that contradicted ICANN's policy and the particular policies that have been contradicted. First, the EIU egregiously misapplied the nexus and endorsement standards contained in Module 4.2.3 of the AGB. Second, it contradicted ICANN's policies of non-discrimination, fairness and transparency contained in ICANN's Articles of Incorporation, Bylaws, the GNSO New gTLD policies, the EIU Expression of Interest, the CPE Panel and Processes and the CPE Guidelines proposed by the EIU itself. And a critical aspect of the EIU's mistakes was its failure to consider material information and its reliance on inaccurate information in conducting its analysis.

The power point presentation we sent you also includes a summary of the BGC's duty when reviewing a Reconsideration Request. As you know, the BGC has to consider whether the EIU correctly applied ICANN's policies. And as recently put by an IRP Panel, "the BGC needs to have a reasonable degree of assurance that the EIU has correctly applied the policy."

Now, how can you have a reasonable degree of assurance that the EIU correctly applied ICANN's policy as implemented in the AGB? You need to properly examine the facts underlying the EIU decision and the relevant parts of the .GAY application. To conduct proper due diligence. Then, you need to make an independent judgement and decide whether the EIU has applied

ICANN's policies correctly to these facts. You are supposed to ensure that the information the EIU relied on is accurate and that the EIU did not ignore any material information during its analysis.

Also, you are supposed to ensure procedural fairness to any applicant that is treated unfairly because of inconsistencies between the findings of different constituents of ICANN, such as an Independent Expert and the EIU. In this respect, I remind you that .LGBT was successfully obtained by a standard applicant over a community objection. As noted by the ICANN Ombudsman, the community objection failed because ultimately the Independent Expert concluded that the interests of the gay community were already protected by the .GAY community application and did not require further protection through the .LGBT. Most importantly, ICANN's Independent Expert confirmed that the gay community matches the definition in Dotgay's application. We quoted his determination in our slides, as this is also a fact the EIU failed to consider. It is your duty to review such determination and ensure that the gay community will not be left unprotected by allowing that not only .LGBT but also .GAY end up a standard gTLD.

But that is not all. You are also supposed to ensure that different CPE Panels are not applying different standards to the same facts. The ICANN Board recently endorsed the recommendation of the Despegar IRP Panel for the Board 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...entities such as the EIU." This Reconsideration Request is an opportunity for the Board to ensure such consistency of scoring in CPE processes.

How can you do that without looking into the facts yourself? You cannot. You need to do your due diligence and understand the underlying facts of the EIU recommendation.

I will pass the word now to Renato Sabbadini, the Executive Director of ILGA – the International Lesbian, Gay, Bisexual, Trans and Intersex Association. ILGA is a global

organization that has over 1100 member organizations and represents countless individuals worldwide. Mr. Sabbadini was deeply involved in the Dotgay community application and will share with you the facts relating to the multi-stakeholder consultation that resulted in this application.

Then, you will hear from me again. I will briefly explain how the EIU contradicted ICANN's policies, discriminated against Dotgay and relied on inaccurate information in its evaluation. I will also make clear what we expect from you following the opportunity we are being given today.

II. Mr. Sabbadini's Statement

See Mr. Sabbadini's Statement.

III. Policies and Procedure Violated by the EIU

Dotgay failed in the CPE process because it received a score of 10, when it needed a score of 14. The two criteria that, according to the EIU, Dotgay did not meet were nexus and community endorsement. I'll start by the nexus and then I'll speak about the endorsement.

A. Nexus

1. AGB Standards

With regards to nexus, Dotgay received zero out of 4 points. Out of the 4 points, 3 points relate to the identity of the community and 1 point relates to the uniqueness of the string.

Dotgay scored zero for uniqueness because the EIU found that the string did not identify the community in the first place. Since no independent analysis of the uniqueness was made, we will focus on the identity of the community. In fact, the EIU recognized that "the more derogatory uses of 'gay' or uses unrelated to sexuality have largely fallen away." In other words, 1 point for "uniqueness" will automatically come if you conclude that .GAY qualifies for a score of 3 or 2 with respect to the community identity, as we hope you will by the end of this presentation.

So what was the key issue for the EIU consideration of nexus? It was its understanding that the greater use of the word gay would not show that the word is used to identify all LGBTQIA individuals, especially transgender, intersex, and ally individuals. And the BGC concluded that the EIU would have accurately described and applied the AGB. According to the BGC, the EIU “concluded that that the string did not match the Application’s definition of community” as the word gay would be “most commonly used to refer to both men and women who identify as homosexual, and not necessarily to others.”

Now, let’s take a close look at the standard applied by the EIU. I will read from page 5 of the CPE Report. It says:

“In order to identify the community defined by the applicant as required for Nexus, the applied-for string must ‘closely describe the community or the community members’, i.e., the applied for string is what ‘the typical community member would naturally be called.’” (AGB) The Panel has therefore considered the extent to which the string ‘gay’ describes the members of the applicant’s defined community and has evaluated whether ‘gay’ is what these individuals would naturally be called. The Panel has determined that more than a small part of the applicant’s defined community is not identified by the applied-for string, as described below, and that it therefore does not meet the requirements for Nexus.”

As you can see, the EIU did not truly consider whether the applied-for string matches the application’s definition of community. Actually, the standard I just read, which was used by the EIU, is not a standard established in the AGB, neither is it a standard applied by other EIU panels when evaluating the nexus criterion. Let’s look at the AGB standard together.

Module 4.2.3 of the AGB states that a score of 3 must be given if the string “matches the name of the community” or “is a well-known short-form or abbreviation of the community name.” The name of the community is, according to the AGB, a “name by which the community is

commonly known by **others**". And the term "others" includes, according to the CPE Guidelines, "individuals **outside** of the community itself."

So the standard is not one that requires all members of the gay community to be necessarily gay, as a specific designation for a particular sexual orientation. If the BGC looks at the AGB standard independently and step-by-step (as it must), it will conclude that Dotgay's application must pass the CPE process. What are the steps that the EIU should have taken?

First, the EIU should have inquired whether "the applied for string" is "*commonly known by others*" as the name of the community or is a well-known short form or abbreviation of the community name. If the answer is yes, then that is the end of the determination. And what are the facts found by the EIU with respect to .GAY? It found that "indeed 'gay' is used more frequently than terms such as LGBT or LGBTQIA in reference to both individuals and communities." Nevertheless, the EIU skipped the first part of the test.

What is it that the EIU did, instead? It went straight to the analysis of whether .GAY qualifies for a score of 2 under the AGB, that is, whether the word "gay" "closely describes the community **or** the community members, without over-reaching substantially beyond the community." That is the AGB standard. And apart from the analysis being unnecessary this standard was also misapplied by the EIU. The AGB provides that a score of 2 must be given if the name closely describes *the community* **or** closely describes the community members. But instead of verifying if the applied-for string "closely describes" the community **as a whole**, the EIU, once again, went straight to the alternative and concluded that the string does not "closely describe" all "community members."

Now, the EIU recognized that not only homosexual individuals, but transgender, intersex and ally are all part of a community engaged in the same activities under the use of the prevalent

term gay. Clearly, that is a factual finding that the word gay not only “closely describes”, but in fact, it “matches the name” of the community formed by homosexual individuals, transgender, intersex and ally.

I have one last comment about the misapplication of the AGB standards for the nexus criterion. As we saw, the EIU approached the issue as though it had to determine what “the typical community member would be naturally called.” The expression “the typical community member would be naturally called” was used in the AGB not to set a standard but to exemplify a string that would be “over-reaching substantially beyond the community.” So you need to ask yourselves: why would .GAY substantially overreach? The EIU provides no support for its assertion that “more than a small part” of the community is not described as gay. It is clear that the EIU did not ask the right question. To conclude that there was a substantial overreach, it asked: “how many community members **may be** more closely described by another term, such as transgender?” But the right question that the EIU should have considered is: “is the community formed by transgender, among others, also closely described by the word gay?” Had the EIU asked this question, the answer would be “yes”.

2. Non-Discrimination Policy

ICANN’s non-discrimination policy was also contradicted by the EIU in its evaluation of the nexus criterion. Why? Because in other cases, the EIU applied the nexus criterion in such a way that it did not require the name of the community to apply to each member of the community. We can point out now to at least three cases: .OSAKA, .HOTEL and .RADIO. With the materials we sent you yesterday, we included some slides showing that the EIU would have reached the same conclusion had it applied the same standard to the equivalent facts.

The BGC has the duty to ensure consistency in the CPE process. For purposes of this analysis, you must closely look into the facts of the relevant underlying applications. If you do so, you will conclude that there is no justification for .GAY's different outcome.

B. Endorsement:

a. **AGB Standards**

The endorsement criterion has an element of support and an element of opposition. I'll deal with support first. To qualify for a maximum score for support, according to the AGB, the applicant needs to have "support from the recognized community institution(s)/member organization(s)" *or* "it needs to otherwise have authority to represent the community". Again, you have alternative standards. And again, the EIU jumbled the standards.

We can find the standard applied by the EIU on page 11 of its recommendation. It says:

The AGB specifies that "recognized" means that an organization must be "clearly recognized by the community members as representative of the community." The ILGA, as shown in its mission and activities, is clearly dedicated to the community and it serves the community and its members in many ways, but "recognition" demands not only this unilateral dedication of an organization to the community, but reciprocal recognition on the part of the community members of the organization's authority to represent them. There is no single such organization recognized by all of the defined communities members as the representative of the defined community in its entirety."

First, the AGB establishes a clear definition for "recognized institutions or organizations", which are organizations that (open quote) "**through membership** or otherwise, are clearly recognized by the community members as representative of the community." The EIU misapplied this standard by requiring some sort of formal recognition **beyond membership** giving authority to an organization to represent the community members. Once again, it skipped the first step of the test; it went straight to a finding of whether the organization (in this case the ILGA) *otherwise*

has authority to represent the gay community, ignoring that, according to the AGB, membership gives the organization authority to represent the community.

Second, the EIU applied a heightened standard that it would require a single organization to represent the community in its entirety, despite the incredible amount of support received by Dotgay from community institutions and organizations.

Once again, the EIU egregiously misapplied the AGB and did not consider material information. Not only the ILGA “serves the community and its members in many ways” as the EIU notes, but it is recognized by the community through membership. It is the BGC’s duty to correct this fundamental mistake.

But that is not all. The EIU also contradicted the AGB by deducting a point for community opposition. The EIU considered that there was opposition from a group of “non-negligible size”. But the EIU failed to consider that the only gay organization that opposed Dotgay’s application was a local community center based in Portland (called Q Center), which is a member of CenterLink, the national organization of community centers that includes as members 200 other local community centers (just as the Q Center) and that itself endorsed Dotgay’s application. On no reasonable standard can a Portland local community center have a “non-negligible size” in the context of the CPE process. Worse, the Q Center is based in the city of Portland, which is the hometown of a standard applicant for the same string, and its opposition came from the influence of the applicant and therefore was filed to obstruct this community application. None of these facts were considered by the EIU when it concluded that the Q Center was an entity of “non-negligible size.”

b. Non-Discrimination Policy

Finally, the EIU was also discriminatory and inconsistent in the application of the endorsement criterion. We included some materials comparing the standard applied by the EIU in

its evaluation of .GAY, .HOTEL and .RADIO. Please look at those. You must correct the misapplication of the AGB standard and the relevant factual findings. And you must enforce ICANN's policy against discrimination.

IV. Conclusion

With that, we get very close to the end of our presentation. What do we expect from you after this hearing?

Please do your due diligence. Closely review all of the facts we brought to your attention today. Closely review the standard applied by the EIU in its evaluation of the Dotgay application and compare them with the relevant AGB provision. You will see how the EIU misapplied the AGB. Also, review the independent expert determination for the community objection of .LGBT. Request from the EIU the underlying materials used for its analysis; inquire whether such materials support the EIU's conclusions. Review the facts underlying the EIU's conclusions and ask yourselves whether they really justify an outcome different from those of other EIU evaluations. You will see that they don't.

Once you do your due diligence, you will conclude that you must reject the EIU recommendation, since under the correct application of the AGB standards, .GAY qualifies to the maximum score in all categories.

In fact, you will see that, within the gay community, community members use a great diversity of terms to identify themselves even while accepting that their community is commonly known as gay. And from the external perspective, people look at this diverse community as simply being outside of the societal norms defined for heterosexual behavior. The EIU should not be making a decision that weighs in what is a social, cultural and political debate. In attempting to do so, the EIU substantially harmed the community by excluding members and preventing the

whole community from enjoying a safe internet environment to gain visibility and advocate its rights.

We remind you that you already sent Dotgay's application back to the EIU once. The EIU, once again, misapplied ICANN's policies. It is your duty to correct this now. And we expect no less of you.

Thank you again for the opportunity to make this presentation today.