

## Rebuttal to the BAMC Recommendation in Reconsideration Request 16-11

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Requesters<sup>1</sup> submit this Rebuttal to the Board Accountability Mechanisms Committee's ('BAMC') Recommendation on Reconsideration Request (RfR) 16-11 (the 'Recommendation'). The Recommendation concerns Requesters' request that the Board (i) reverse Resolutions 2016.08.09.14 through 2016.08.09.15 (the '2016 Resolutions'), (ii) declare that HTLD's application for .hotel is cancelled, and take whatever steps towards HTLD it deems necessary, (iii) organize a hearing for Requestors following disclosure of the documents asked for, (iv) take the necessary steps to ensure a meaningful review of the CPE regarding .hotel, ensuring consistency of approach with its handling of other cases such as the Dot Registry, the Corn Lake and the Ruby Pike cases, and (v) address the inconsistencies in the CPE report on .hotel.

As Requesters explain in this rebuttal, the BAMC's Recommendation is based on both factual errors and on a misrepresentation of Requesters' position and of the applicable rules.

### **I. PRELIMINARY REMARKS**

#### **A. Imbalance due to formal requirements and lack of transparency**

This rebuttal is submitted in accordance with Article 4(2)(q) of ICANN's Bylaws (the 'Bylaws'). However, the formal requirements of Article 4(2)(q) and the circumstances of this case create an unjustified imbalance that prevents Requesters from participating in the reconsideration proceedings in a meaningful way. The imbalance is illustrated by the fact that, since the date of the last telephonic hearing in this case (*i.e.*, 19 July 2018), the BAMC took almost four months to prepare its 33-page Recommendation, whereas Requesters must respond within 15 days in a 10-page rebuttal. What is more, Requesters are given no access to essential documents kept by ICANN<sup>2</sup> and are therefore not given a fair opportunity to contest all arguments and evidence adduced by the BAMC. Without access to the underlying documents, Requesters are unable to verify many of the BAMC's factual arguments.

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<sup>1</sup> Travel Reservations SRL, Minds + Machines Group Limited, Radix FZC, dot Hotel Inc. and Fegistry LLC.

<sup>2</sup> *E.g.*, the report that was to be made by ICANN's President and CEO or his designee(s) on the portal configuration issue, the communications between ICANN and CPE Provider, between ICANN and HTLD, etc.

As a result, this rebuttal is not intended to be a complete statement of the elements of fact or law relevant to this matter and is sent without prejudice and reserving all rights.

### **B. Applicable Bylaws**

The BAMC has considered RfR 16-11 under a previous version of the Bylaws, namely the version of 11 February 2016.<sup>3</sup> However, when establishing its own authority to review and consider RfR 16-11, the BAMC refers to a more recent version of the Bylaws, namely the version of 22 July 2017.<sup>4</sup>

There is no valid ground to consider RfR 16-11 under a previous version of the Bylaws, let alone a ground for the BAMC, or the ICANN Board, to pick and choose which version of the Bylaws it uses, depending on the circumstances. The BAMC and the ICANN Board must use the version of the Bylaws that is applicable when making their recommendation *c.q.* decision. For that reason alone, the BAMC errs when it maintains that “under the relevant Bylaws, reconsideration is permitted only to challenge Board actions taken either: (a) without consideration of material information, or (b) in reliance on false or inaccurate material information.”<sup>5</sup> Indeed, the applicable version of the Bylaws (version of 18 June 2018) explicitly provides that RfRs may be submitted *inter alia* “to the extent that the requestor has been adversely affected by [...] one or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies)”. This provision explicitly confirms a long-established principle that the ICANN Board must warrant observance of its Mission, Commitments, Core Values and established policies<sup>6</sup>, just like the ICANN Board must comply with all fundamental principles of its Articles of Incorporation and Bylaws<sup>7</sup>. When, as in the case at hand, it is confronted with a violation of its Rules or Principles, the ICANN Board must offer corrective measures to those parties affected.

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<sup>3</sup> Recommendation 16-11, p. 18, fn. 81; pp. 19-20.

<sup>4</sup> Recommendation, p. 2, fn. 9; p. 19, fn. 83.

<sup>5</sup> Recommendation, pp. 19-20.

<sup>6</sup> ICANN’s Mission, Commitments, Core Values and established policies are collectively referred to hereinafter as ‘Rules’.

<sup>7</sup> These fundamental principles are collectively referred to hereinafter as ‘Principles’.

Moreover, even if reconsideration was only permitted to challenge Board actions on the limited grounds examined by the BAMC (*quod non*), reconsideration would still be warranted, as the challenged Board decisions were taken (a) without consideration of material information, and (b) in reliance on false or inaccurate material information.

**II. ICANN FAILED TO CONSIDER MATERIAL INFORMATION ON HTLD AND ITS CEO'S INVOLVEMENT IN THE UNAUTHORIZED ACCESS TO OTHER APPLICANTS' CONFIDENTIAL INFORMATION**

As described in RfR 16-11, Requesters learnt from the 2016 Resolutions that Mr. Krischenowski was not the only individual affiliated to HTLD who violated Requesters' trade secrets. Mr. Oliver Süme and Ms. Katrin Ohlmer, HTLD's CEO at the time, were also "responsible for numerous instances of suspected intentional unauthorized access to other applicants' confidential information".<sup>8</sup>

However, in the 2016 Resolutions, the ICANN Board ignored the role of Ms. Ohlmer. As is apparent from the whereas clauses of the decision and the rationale, the ICANN Board only considered Mr. Krischenowski's behavior and not to the material facts of Ms. Ohlmer's intentional unauthorized access to other applicants' confidential information and her role as HTLD's CEO when accessing the confidential information.

The BAMC ignores that this material information was not considered by the ICANN Board and should, along with the other facts in this matter, have led to the disqualification of HTLD as an applicant. The Recommendation mentions Ms. Ohlmer's unauthorized involvement in a footnote, (i) alleging that Requesters acknowledge that Ms. Ohlmer's prior association with HTLD had ended no later than 17 June 2016, and (ii) concluding that her prior association with HTLD does not support reconsideration "because there is no evidence that any of the confidential information that Ms. Ohlmer (or Mr. Krischenowski) improperly accessed was provided to HTLD or resulted in an unfair advantage to HTLD's Application in CPE."<sup>9</sup>

Both the BAMC's allegation and its conclusion are incorrect. First, Requesters' statement that Ms. Ohlmer was listed as CEO in HTLD's application until 17 June 2016 is not an

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<sup>8</sup> See rationale to the 2016 Resolutions.

<sup>9</sup> Recommendation, p. 10, fn.44.

acknowledgment that Ms. Ohlmer's prior association with HTLD had ended by then. Second, Ms. Ohlmer illegally accessed confidential information at a time when she was CEO of HTLD. Through her access of this confidential information as CEO, the information was automatically provided to HTLD. Indeed, the individual who manages (or managed) HTLD was informed of competitors' trade secrets as from the moment Ms. Ohlmer accessed the confidential information. HTLD acknowledged that she was (i) principally responsible for representing HTLD, (ii) highly involved in the process of organizing and garnering support for the .hotel application, and (iii) responsible for the day-to-day business operations of HTLD. The fact that unauthorized access occurred on more than one occasion by different individuals associated to HTLD and that information contained in the applications of direct competitors was targeted, shows that the unauthorized access by HTLD's executives was made willfully and with intent.

Instead of acknowledging this fact and taking appropriate action by cancelling HTLD's application, ICANN fully relied on limited, self-serving and unverified statements by Mr. Philipp Grabensee<sup>10</sup> – HTLD's newly appointed Managing Director who had all interest in securing the investment in HTLD, made by a company of which he is a co-founder and deputy chairman – and an alleged, but undisclosed, affirmation by Mr. Krischenowski<sup>11</sup> through legal counsel.<sup>12</sup> The fact that the latter affirmation remains undisclosed is a clear violation of ICANN's transparency obligations. Even the identity of Mr. Krischenowski's legal counsel remains hidden. For all we know, Mr. Krischenowski might have been represented by Mr. Grabensee<sup>13</sup> or anyone else with a personal interest in HTLD. There is also no sign that Mr. Süme and Ms. Ohlmer made similar affirmations as the one allegedly made by Mr. Krischenowski. Without access to the underlying documents, it is impossible to

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<sup>10</sup> Letter from Mr. Philipp Grabensee to ICANN of 23 March 2016, <https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf>; letter from Mr. Philipp Grabensee to ICANN of 18 May 2016, <https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-18may16-en.pdf>; BAMC Recommendation, p. 10.

<sup>11</sup> BAMC Recommendation, p. 20: “ICANN org concluded that Mr. Krischenowski's affirmation that he and his associates did not and would not share the confidential information with HTLD, coupled with HTLD's confirmation that it did not receive the confidential information, was sufficient verification under ICANN org's policies and procedures [...]”

<sup>12</sup> Letter from ICANN to HTLD of 16 March 2016, <https://www.icann.org/en/system/files/correspondence/willett-to-lenz-hawliczek-16mar16-en.pdf>.

<sup>13</sup> Mr. Philip Grabensee is a German lawyer, practicing criminal law. See: <http://www.shsg.de/desk/index.php?id=44>.

verify the precise content and meaning of any such affirmations or even their existence. In any event, given Ms. Ohlmer's position with HTLD at the time of illegal access, it is impossible for her to make an affirmative statement that she did not and would not share the confidential information with HTLD. As a result, it is also impossible for HTLD to confirm that it did not access the confidential information.

Moreover, contrary to ICANN's claim, HTLD never confirmed that it did not "receive the confidential information".<sup>14</sup> Mr. Grabensee's self-serving statement on which ICANN bases its conclusion is carefully worded and makes a distinction between HTLD's personnel and HTLD. His statement reads as follows in the relevant paragraph:

"Mr. Krischenowski did not inform [HTLD]'s personnel of his action and did not provide any of the accessed information to [HTLD] or its personnel. [HTLD]'s personnel did not have any knowledge about Mr. Krischenowski's action, and did not consent to it or approve it. They only learned about it on 30 April 2015 in the context of ICANN's investigation."

This statement does not allow for the inference that HTLD did not (i) receive the information, or (ii) otherwise access the confidential information. Moreover, the statement regarding Mr. Krischenowski not informing about his actions only relates to HTLD's personnel; not to HTLD as such, HTLD's owners, or HTLD's (self-employed) executives.

In addition, even if HTLD had confirmed that it did not receive, or was not provided with, the confidential information, such a confirmation would not suffice. Ms. Ohlmer's actions, as disclosed in the 2016 Resolutions, show that HTLD accessed the confidential information it illegally obtained. Any statement to the contrary would not be credible.

In any event, the fact that ICANN read into Mr. Grabensee's statement a confirmation by HTLD that it did not receive the confidential information shows that the challenged Board decisions were made in reliance on false or inaccurate material information, as no such confirmation was made by HTLD. Contrary to ICANN's allegations, Requesters do not ignore the "evidence" allegedly uncovered by ICANN.<sup>15</sup> But Requesters challenge the lack of

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<sup>14</sup> BAMC Recommendation, p. 20.

<sup>15</sup> Recommendation, p. 25.

a critical review by ICANN of HTLD's self-serving statements and the fact that ICANN has only given a sparse view on this untested "evidence".

**III. ICANN FAILED TO CONSIDER MATERIAL INFORMATION DEMONSTRATING THAT THE INFORMATION ILLEGALLY OBTAINED BY MR. KRISCHENOWSKI WAS USED TO HTLD'S BENEFIT**

ICANN failed to consider *inter alia* the material information that (i) HTLD waited for almost an entire year, and after being summoned by ICANN, to terminate its relationship with Mr. Krischenowski, (ii) Mr. Krischenowski's illegal access to trade secrets must have influenced his decision making and his consultancy services to HTLD, (iii) HTLD kept Mr. Krischenowski as consultant until 31 December 2015 (*i.e.*, more than eight months after HTLD was summoned by ICANN), and (iv) HTLD has not provided any explanation as to why it kept Mr. Krischenowski as a consultant until 31 December 2015, although HTLD admits it knew about Mr. Krischenowski's illegal actions at least since 30 April 2015. HTLD has given no information whatsoever about Mr. Krischenowski's consultancy services between April 2014 and December 2015.<sup>16</sup>

There can be no doubt about the fact that Mr. Krischenowski used the information he illegally accessed to the benefit of HTLD, a company he had invested in through his 50% share in one of HTLD's major shareholders (*infra*). Indeed, Mr. Krischenowski cannot undo his actions, nor the fact that he illegally obtained trade secrets of HTLD's competitors. Even if Mr. Krischenowski considered that there was no need to change HTLD's plans or to inform HTLD about the information he accessed, such decision would have been influenced by the information he obtained illegally. As a result, there is sufficient evidence that the information Mr. Krischenowski obtained as a result of the portal issue was used to support HTLD's application.

**IV. ICANN FAILED TO CONSIDER MATERIAL INFORMATION AS IT IGNORED ITS RULES, PRINCIPLES AND ITS POLICIES AND PROCEDURES TO DISQUALIFY APPLICATIONS FROM THE NEW gTLD PROGRAM**

As explained in RfR 16-11, allowing HTLD's application to proceed is contrary to ICANN's

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<sup>16</sup> See: letter from Mr. Philipp Grabensee to ICANN of 18 May 2016, <https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-18may16-en.pdf>: HTLD only provided information about the period leading to HTLD's application, limited information about Mr. Krischenowski's consultancy services in March 2014 and information about the absence of a relationship on 18 May 2016.

Rules and Principles. ICANN caught not one, but multiple representatives of HTLD stealing trade secrets of competing applicants via the use of computers and the Internet. This kind of behavior was listed explicitly among the circumstances leading to the automatic disqualification from the New gTLD Program.<sup>17</sup> ICANN failed to consider this material fact and information in its decision that cancellation of HTLD's application is not warranted. ICANN's decision goes against the text and the spirit of the allocation criteria for critical Internet resources.

As part of its background screening, which is in place “to protect the public interest in the allocation of critical Internet resources”, ICANN was going to assess the behavior and antecedents of an applying entity's directors, officers, partners and major shareholders. At least two of HTLD's representatives engaged in illegal behavior that constitutes a ground for automatic disqualification from the New gTLD Program. When they committed the crime, Ms. Ohlmer was HTLD's CEO and Mr. Krischenowski was a major shareholder of HTLD through his 50% share in HOTEL Top-Level-Domain GmbH, Berlin (GmbH Berlin). GmbH Berlin was a 48,8% shareholder of HTLD. As a result, Mr. Krischenowski, who was GmbH Berlin's CEO, held 24,4% of the shares in HTLD through GmbH Berlin.

The BAMC is silent about Ms. Ohlmer's role as CEO and it tries to downplay Mr. Krischenowski's stake in HTLD by stating that he was “merely a 50% shareholder in an entity that was a minority shareholder in HTLD.”<sup>18</sup> Remarkably, the word “merely” was added by ICANN. It does not appear in the letter from Mr. Grabensee to which ICANN refers, when making this statement.<sup>19</sup> ICANN's own addition of the word “merely” suggests that ICANN was biased in its consideration of the matter. The point is all the stronger as the Guidebook provides that a shareholder holding at least 15% of shares in an applicant is a major shareholder, subject to background screening.<sup>20</sup> Also this material information was

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<sup>17</sup> gTLD Applicant Guidebook (v. 2012-06-04), Module 1-22.

<sup>18</sup> BAMC Recommendation, p. 25 (emphasis added).

<sup>19</sup> BAMC Recommendation, p. 25, fn. 104; Letter from Mr. Philipp Grabensee to ICANN of 23 March 2016, <https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf>

<sup>20</sup> gTLD Applicant Guidebook (v. 2012-06-04), Module 2-3 *juncto* Attachment to Module 2, A-7, Question 11(c).

ignored by ICANN in its apparent effort to deemphasize Mr. Krischenowski's close affiliation with HTLD.

**V. ICANN'S FAILURE AND UNWILLINGNESS TO CONSIDER MATERIAL INFORMATION**

As is apparent from *inter alia* RfR 16-11, Requesters' letter of 28 December 2016 and Section III above, Requesters have demonstrated the unfair competitive advantage gained by HTLD as a result of Mr. Krischenowski's and Ms. Ohlmer's illegal access to trade secrets of competing applicants. ICANN's failure to consider the full extent of HTLD's unfair competitive advantage is evidenced by Mr. Cherine Chalaby's question during a telephone conversation on 16 December 2016 between the BGC and counsel to Requesters. Mr. Chalaby asked if the request to have HTLD's application cancelled was really appropriate, given that the unauthorized access by HTLD executives was not relevant as regards HTLD's application, which had already been filed. The fact that this question was raised by the ICANN Board Member who seconded the 2016 Resolutions<sup>21</sup> shows that the ICANN Board had not previously considered (i) the unfair advantage for HTLD over competing registry operators in the event that HTLD were allowed to operate the .hotel gTLD, (ii) the unfair advantage for HTLD in its application strategy, as it obtained intelligence that may have influenced its decision to maintain its application, nor (iii) the fact that HTLD's illegal access to trade secrets amounted to behavior that is unacceptable to the Internet community. This material information was previously submitted to ICANN and the ICANN Board, but has demonstrably never been considered by the Board.

The Recommendation suggests that ICANN is not willing to consider this material information. Instead, ICANN continues to focus solely on the immediate effects of Mr. Krischenowski's actions to HTLD's application and the CPE process. With respect to the latter, the Recommendation states:

“There is no evidence that the CPE Panel had any interaction at all with Mr. Krischenowski during the CPE process, and therefore there is no reason to believe that

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<sup>21</sup> ICANN, *Minutes - Special Meeting of the ICANN Board*, 9 August 2016, <https://www.icann.org/resources/board-material/minutes-2016-08-09-cn#2.h>.



the CPE Panel ever received the confidential information that Mr. Krischenowski obtained.”<sup>22</sup>

Apart from the fact that HTLD’s unfair competitive advantage exists also without any interactions between the CPE Panel and Mr. Krischenowski, it is striking that ICANN is apparently not in a position to make an affirmative statement that no such interactions took place. The fact that ICANN cannot confirm that there were no interactions between the CPE Panel and individuals associated to HTLD shows the insufficiency of the CPE Process review and of ICANN’s alleged “forensic review and investigation”.

The BAMC also considers that “the Board determined that the Requestors were not harmed as a result of the information Mr. Krischenowski and his associates obtained through the portal misconfiguration.”<sup>23</sup> However, the Board never made such determination, nor could it make such a determination, as Requesters’ trade secrets were violated.

In any event, ICANN’s focus on the effects and harm caused by the illegal actions by HTLD representatives is misplaced. Even if the harmful effects might not be immediately visible, that has no bearing on this matter. The fact remains that it is inappropriate to allocate a critical Internet resource to a party that has been cheating. Illegal activities are not judged by their harmful effects.

**VI. ICANN FAILED TO CONSIDER MATERIAL INFORMATION THAT WARRANTS A MEANINGFUL REVIEW OF THE CPE REGARDING .HOTEL**

Somewhat provocatively, the BAMC alleges that Requesters do not challenge the application of the CPE criteria to HTLD’s application or a particular finding by the CPE Provider on any of the CPE criteria.<sup>24</sup> That is simply not true. Requesters challenged ICANN’s decision for violation of ICANN’s Articles of Incorporation and Bylaws *inter alia* by the inconsistent and erroneous application of CPE criteria and for ICANN’s failure to correct these inconsistencies.<sup>25</sup>

Requesters also challenge the fact that ICANN has prejudged on, and failed to consider, the

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<sup>22</sup> Recommendation, p. 21.

<sup>23</sup> Recommendation, p. 24.

<sup>24</sup> Recommendation, p. 1.

<sup>25</sup> See e.g., RfR 16-11, pp. 10-11; Letter from Requesters to ICANN of 1 February 2018, <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>, pp. 3-4.

arguments against accepting the conclusions of the FTI report.<sup>26</sup> In addition, Requesters maintain their arguments with respect to ICANN's discriminatory treatment. The BAMC's assertion that ICANN's handling of .charity involved different facts and circumstances<sup>27</sup> is unsupported and ICANN provides no justification for its disparate treatment.

With respect to the communications between ICANN and the CPE Panel, there is no reason for ICANN not to disclose these. Without access to these documents, Requesters are not in a position to dispute allegations made by ICANN. Requesters have every reason to be suspicious, as ICANN has previously made false statements about the existence of these documents. Indeed, ICANN made a clear and comprehensive statement that it did not have any communications with the evaluators that identify the scoring of any individual CPE.<sup>28</sup> However, the FTI report revealed that ICANN has been commenting on the clarity of reasoning behind assigning one score or another and provided feedback to the CPE Provider's draft reports.<sup>29</sup> ICANN could not have made such comments without access to communications that identify the scoring of individual CPEs. Without full transparency about the CPE of .hotel, ICANN fails to provide a meaningful review.

## VII. CONCLUSION

Based on the foregoing and on the reasons expressed in RfR 16-11 and the letters exchanged in relation to this RfR, Requesters request that the Board deny the BAMC Recommendation and grant RfR 16-11.

Respectfully submitted,

30 November 2018

  
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<sup>26</sup> See Recommendation, p. 29; The arguments made in relation to RfR 18-6 are incorporated here by reference.

<sup>27</sup> Recommendation, pp. 28-29.

<sup>28</sup> *Despegar et al.* IRP Declaration, § 95.

<sup>29</sup> FTI Report, Scope 1, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>, p. 16; see also *Id.* At pp. 9, 14 and 15.