

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE  
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/495/ICANN/112

UNIVERSAL POSTAL UNION  
(SWITZERLAND)

vs/

AMAZON EU S.A.R.L.  
LUXEMBOURG

This document is a copy of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

INTERNATIONAL CHAMBER OF COMMERCE  
INTERNATIONAL CENTRE FOR EXPERTISE  
EXP/495/ICANN/112

**EXPERT DETERMINATION**  
**(Community Objection)**

In the matter

**UNIVERSAL POSTAL UNION**  
**(Switzerland)**

vs/

**AMAZON EU S.A.R.L.**  
**(Luxembourg)**

Issued by

Professor Catherine KESSEDJIAN  
Expert

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## ACRONYMS AND DEFINITIONS

### General

Amazon:	Amazon EU S.A.R.L. or the Applicant
Appendix III:	Appendix III to the Rules, Schedule of Expertise Costs for Proceedings under the New gTLD Dispute Resolution Procedure
Centre:	The ICC Centre for Expertise
Guidebook:	ICANN gTLD Applicant Guidebook, Module 3 (version of 4 June 2012)
ICANN 2007 Report:	ICANN Final Report on the Introduction of New Generic Top-Level Domains, 8 August 2007, last updated 4 September 2009 (referred to in section 3.2.1. of Module 3)
ICC Practice Note:	ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure
Module 3:	Module 3 of the ICANN gTLD Applicant Guidebook
Procedure:	Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure
Rules:	The Rules for Expertise of the ICC
UPU:	Universal Postal Union or the Objector

### Pleadings and Other Procedural Elements

Annex (followed by number):	Annexes to the Applicant's Response
Applicant:	Amazon
Closed gTLD:	A gTLD which is proposed to be operated for the sole benefit of the Applicant
DNS:	Domain Name System
DNSSEC:	Domain Name System Security Extensions
DPO:	Designated Postal Operator
Established Institution:	An Institution, as defined in section 3.2.2. of Module 3
Exhibit (followed by number):	Annexes to the Objector's Objection
GAC:	Governmental Advisory Committee to ICANN
IO:	The Independent Objector appointed by ICANN
Objection:	The Objection filed by UPU on 13 March 2013
Objector:	UPU
Response:	The response to the Objection filed by Amazon on 18 May 2013
Sponsored gTLD:	A gTLD in the meaning defined by the ICANN 2007 Report
USPS	United States Postal Service

## I. INTRODUCTION

### A. THE PARTIES

1. The Objector

**UNIVERSAL POSTAL UNION**

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hereinafter referred to as “UPU” or “the Objector”

2. The Applicant

**AMAZON EU S.A.R.L.**

5 rue Plaetis  
Luxembourg  
L – 2338 Luxembourg

hereinafter referred to as “Amazon” or “the Applicant”

**represented by**

**CROWELL & MORING**

Mr. Flip Petillion  
Rue Joseph Stevens 7  
1000 Brussels  
Belgium  
email: fpetillion@crowell.com

3. The Objector and the Applicant are hereinafter collectively referred to as “**the Parties**”.

### B. THE EXPERT PANEL

4. By letter of 25 June 2013, the Centre informed the Parties that the Chairman of the Standing Committee appointed the Expert Panel on 14 June 2013, pursuant to Article 3(3) of Appendix I to the Rules.

5. The Expert Panel is composed of one Expert:

**Prof. Catherine Kessedjian**

19 villa Seurat  
Boîte/Porte B  
75014 Paris  
France

## C. THE BACKGROUND OF THE DISPUTE

### 1. The New gTLDs

6. After a long consideration with several rounds of public comments and consultation, ICANN has decided to open the way for a large number of new generic top-level domain names (“gTLDs”), while they were before very limited in number (22 as of 13 June 2012). The goal set by ICANN is to “open up the top-level of the Internet namespace to foster diversity, encourage competition and enhance the utility of the DNS”<sup>1</sup>.
7. On 13 June 2012, ICANN publicly released a listing of approximately 1900 new gTLDs Applications. These Applications were made by persons and entities that want to manage the new gTLDs in a manner described in the applications, only part of which is known by the public. Public literature indicates that Amazon filed Applications for 76 gTLDs.
8. After all Applications were published, there was a period for objections from persons and entities that opposed the attribution of some of the new gTLDs.
9. ICANN also appointed an Independent Objector (IO) in the person of Professor Alain Pellet. The present case is not stemming out of an IO’s objection.
10. The present dispute arose out of UPU’s Objection to the .mail new gTLD for which Amazon filed an Application posted on 13 June 2012, under reference N° 1-1316-17384.
11. Before going into the details of the Objection and the Response, it is worth mentioning that this dispute is a “**Community Objection**”, as defined by Article 2(e)(iv) of the Procedure and further explained in the Applicant Guidebook. We will set out below the tests which must be met for the Objection to prevail as set out in Module 3 of the Applicant Guidebook<sup>2</sup>.

### 2. The Agreement to the Dispute Resolution Mechanism

12. By filing an Application, an Objection or a Response under the Dispute Resolution mechanism defined by ICANN, both the Objector and the Applicant agree on the set of procedural rules listed in the Centre’s letter of 13 August 2013, all of them being available on the Centre’s website. For the sake of clarity, these rules are:

- The Rules for Expertise of the ICC (“Rules”)

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<sup>1</sup> Preamble to Applicant Guidebook, p.2.

<sup>2</sup> See, notably, p.6 below.

- Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure (Appendix III”)
- ICC Practice Note on the Administration of Cases (“ICC Practice Note”)
- Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure (“Procedure”)
- Module 3 of the gTLD Applicant Guidebook (“Guidebook”).

13. Particularly, the Parties agree that the Expert Determination is binding upon them.

14. It is unclear, however, whether the Expert Determination is binding upon ICANN. This point need not be decided because it falls outside the scope of this Expert Determination.

### **3. The Objection and the Response**

15. UPU filed the Objection to the .mail gTLD Application by Amazon on 13 March 2013.

16. The ICC Centre acknowledged receipt of the Objection on 18 March 2013 which was then registered for processing on 5 April 2013.

17. During the month of April 2013, there was discussion between the Parties and the Centre as to the possible consolidation of the present case with other cases filed for the same .mail gTLD. Consolidation was requested by UPU but opposed by Amazon.

18. On 2 May 2013, the ICC Centre for Expertise wrote to the Parties informing them that it decided not to proceed with the consolidation of the present case with other cases relating to the .mail gTLD.

19. This is why the present case proceeds independently from the other cases filed for the .mail gTLD.

### **D. THE SCOPE OF THE PRESENT EXPERT DETERMINATION**

20. The present Expert Determination is limited to the examination of the standards defined by ICANN for a **Community Objection** in Module 3.

21. Module 3 deals with Community Objection in three different parts.

22. First, section 3.2.1. of Module 3 describes the grounds for objection, including the Community Objection, and refers the reader to the ICANN report on the policy development process for the new gTLDs, report dated 7 August 2007, available on line on ICANN's website, for "the rationales for these objection grounds"<sup>3</sup>. This report is referred below as the ICANN 2007 Report<sup>4</sup>.
23. Second, section 3.2.2.4. describes who is eligible to file a Community Objection and defines further which factors could be taken into consideration to decide whether the Objector is an Established Institution and whether it has an ongoing relationship with a clearly delineated community.
24. Finally, section 3.5.4. defines four (4) tests which the Expert Panel must take into consideration in order to decide whether the objection prevails. These four tests are, as follows:
- The objector must be an established institution with an ongoing relationship with a clearly delineated community; and
  - Community opposition to the application is substantial; and
  - There is a strong association between the community invoked and the applied-for gTLD string; and
  - The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.
25. The four tests mentioned in the preceding paragraph are cumulative, i.e. if any one of them is not met by the Objector, the Objection must be rejected.
26. It must also be stressed that the burden of proof lies with the Objector (Article 20(c) of the Procedure).
27. The overall philosophy of the Community Objections transpires from the Public Comment Summary prepared by ICANN and dated 21 February 2011 (Annex 1). Notably, ICANN emphasizes that "the ultimate goal of the community-objection process is prevent the misappropriation of a community label by delegation of a TLD and to ensure that an

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<sup>3</sup> This is the report referred to in Article 2(e) of the Procedure.

<sup>4</sup> It is to be noted that the online version of the ICANN 2007 Report mentions it was last updated on 4 September 2009.



objector cannot keep an applicant with a legitimate interest in the TLD from succeeding.” (Annex 1, p.94 and again p.104).

## **II. THE COURSE OF THE EXPERT DETERMINATION PROCEEDINGS**

### **A. THE EXPERT MISSION, LANGUAGE AND TIMETABLE**

28. According to the ICC Centre’s letter of 13 August 2013, the requirement for a written “expert mission” is waived in accordance with point 6 of the ICC Practice Note.
29. According to the same letter, the Expert Panel could have decided to establish such a document. However, after due consideration, the Expert Panel decided not to do so.
30. Pursuant to Article 5(a) of the Procedure, the language of the submissions and proceedings is English.
31. Pursuant to Article 6(a) of the Procedure, the correspondence between the Parties, the Expert and the Centre was entirely submitted in electronic form.
32. Pursuant to Article 4(d) of the Procedure, the place of the proceedings is Paris, France.
33. Article 21(a) of the Procedure provides that the Centre and the Expert shall make reasonable efforts to ensure that the Expert renders his decision within 45 days of the constitution of the Expert Panel. The Centre considers that the Panel is constituted when the Expert is appointed, the parties have paid their respective advances on costs in full and the file is transmitted to the Expert. In this case, the Panel was constituted on 13 August 2013 (i.e. the date on which the file was transmitted to the Expert). Accordingly, the Centre and the Expert were to make reasonable efforts to ensure that her determination was rendered no later than 27 September 2013 (as calculated in accordance with Articles 6(e) and 6(f) of the Procedure).
34. Pursuant to Article 21(b) of the Procedure, the Expert submitted her draft Determination to the Centre on 10 September 2013, for scrutiny as to form before it was signed.

### **B. PARTIES’ SUBMISSIONS**

35. The Expert Panel decided the present case according to the following documents filed by the parties:

- The Objection filed by UPU on 13 March 2013 with 20 exhibits. On 14 March 2013, UPU replaced the content of Exhibit 17, requesting that the “new exhibit 17” be taken into consideration instead of the one filed with the Objection.
- The Response filed by Amazon on 18 May 2013 with 31 annexes.

36. According to the Procedure, both the Objection and the Response and all of the exhibits and annexes were transferred to the Expert Panel in electronic form.

37. Pursuant to Article 19(a) of the Procedure, the Expert Panel decided not to hold a hearing.

38. The Expert Panel decided not to request additional evidence from the Parties.

### **III. THE DISPUTE**

#### **A. THE OBJECTOR’S MAIN ARGUMENTS**

##### **1. UPU has standing as it is an established institution which represents a “clearly delineated community”**

39. UPU argues that it is an Established Institution, in the meaning of section 3.2.2.4. of the Guidebook, since it is in existence as an intergovernmental organization for over 118 years and is, since 1948, a specialized agency of the United Nations. It is composed of 192 member countries which have designated altogether 199 DPOs (Exhibit 1).

40. UPU argues that it serves the Postal Community which is a clearly delineated community as required by the Guidebook. UPU acts via a number of bodies and the Universal Postal Congress, held every four years (exhibits 3 and 5). It also claims that it serves the general public because “the Postal Community functions to protect the interests of the public in strong, secure and trustworthy mail services and to facilitate international cooperation in the mailing field” (Objection p.8).

##### **2. Community opposition to the application is substantial**

41. UPU’s mandate is, among others, “to stimulate the lasting development of efficient and accessible universal postal services of quality, in order to facilitate communication between the inhabitants of the world” (Objection p.7). UPU’s mandate also directs the organization to adopt “fair common standards and the use of technology, the cooperation and interaction among stakeholders, the promotion of effective technical cooperation and the satisfaction of customers’ changing needs” (Objection p.7).

42. Because of that mandate, several Posts have asked the UPU to file the Objection “with the approval of the Director General”. In consequence, UPU argues that “the filing of this Objection by the UPU on behalf of the Postal Community alone demonstrates substantial opposition to the Application from the Postal Community” (Objection p.10).
43. In order to prove that there is substantial opposition from the Postal Community, UPU argues that five Posts filed over eighty Public Comments against the Application (Exhibit 7), having invested “significant time, efforts and funds” for that purpose. Among the Posts opposed to the Application is USPS which handles more than 40% of the world’s mail volume (Objection p.10).
44. Therefore, according to the UPU, there is a substantial opposition by the Community invoked.

**3. There is a strong association between the community invoked and the .mail string**

45. UPU argues that the operation and interests of the Postal Community are implicitly targeted by the proposed gTLD .mail because it threatens to interrupt the smooth and secure provision of mail services (Objection p.8).
46. UPU argues further that the Applicant “does not take into account the accepted meaning of the term ‘mail’ and the Postal community” (Objection p.11). According to UPU, the Applicant intends to operate the gTLD .mail as a closed registry, which, among others, will have the consequence that “the Postal Community will be barred from using the .mail TLD to communicate with the public regarding ‘mail’” (Objection p.12).
47. UPU also claims that the public associates the term “mail” with the goods and services provided by members of the Postal Community (Objection p.12 and 18, Exhibit 13). In most countries, “mail” and “post” are associated, says UPU, and they refer to a “regulated industry”. However, the manner in which the Applicant proposes to run the .mail TLD means that it “would be skipping over the entities that actually provide mail services” (Objection p.13).
48. Consequently, there is a strong association between the community invoked and the .mail string.

#### **4. Amazon’s application does create a likelihood of material detriment**

49. UPU argues that the Applicant’s proposed operation of the .mail TLD “would substantially damage the Postal Community’s reputation by failing to meet the public expectations regarding the reliability, privacy and security of “mail” which has been established through great effort by the Postal Community” and through regulations which make mail exchanges “secret and inviolable” (Objection, p.14). This is why Posts are often considered as “trusted institutions” thanks to security strategies put together by the UPU through its Postal Security Group (Exhibit 5) which have raised the level of expectation of the public in the privacy and security of “mail” (Objection, p.15 and Exhibits 15 and 16).
50. The risk of confusion of the public is important, says UPU, as the .mail TLD “and the associated websites” would be given the same level of trust by the public as they give to the mail when, in fact, those websites would not warrant the same security and privacy (Objection, p.16). Having that in mind, UPU predicts that “Posts will [...] have to commit time and resources to complaints directed at them by mistake as a result of unregulated activities conducted at the .mail TLD” (Objection, p.16).
51. UPU insists that “the Applicant’s proposed use of the .mail TLD ignores the public interest in protection of smooth, secure delivery of the world’s mail by the Postal Community” (Objection, p. 16-17) which was ICANN’s mandate to UPU with the .post sponsored TLD. Moreover, the establishment of the .mail TLD will misdirect “consumers from the websites of the Posts or from .post websites to websites on the .mail TLD, thereby disrupting the activities of the Postal Community and harming the public” (Objection p.17).
52. Finally, UPU argues that the Postal Community depends on the DNS for its core activities and that the use of .mail TLD by the Applicant would “unfairly encroach” on the Postal Community’s goods and services (Objection p.18-19 and Exhibits 19 & 20).

## **B. THE APPLICANT’S MAIN ARGUMENTS**

### **1. UPU does not have standing as it does not represent a clearly delineated community**

53. Amazon first argues that the community invoked by the Objector is composed of only one entity, namely its own organization which does not have the monopoly of “providing efficient and accessible (universal) postal services of quality across the world” (Response, p.5). “Apart from the DPOs, [...] there are many companies providing postal services and

DPOs are free to rely on non-DPOs in the international exchange of (letter-)post items (Response, p.5). Companies such as DHL and the like are not part of the ‘community’ described by the Objector, even though they provide postal services globally (Annexes 4-7).

54. In addition, says Amazon, there is a clear tendency to liberalize the postal sector (Annex 8), to enhance competition in the postal industry and the Objector does not represent the new incumbents who do not belong to the Postal Community as described by the Objector. Indeed, the postal sector is comprised of all private and public operators involved in the collection, sorting, transmission and delivery of postal items (Response, p.6). Therefore, the Postal Community invoked by the Objector only comprises a small fraction of the postal sector, and is an “artificial fraction” of same “which can shift if UPU Member-Countries so decide” (Response, p.6).

55. In any case, UPU is not an Established Institution in the meaning of section 3.2.2.4. of the Guidebook

56. Consequently, the Objector lacks standing as it is not associated with a ‘clearly delineated community’.

## **2. Community opposition is not substantial**

57. The Objector misrepresents the facts, particularly because “the Objector’s argument that ‘several Posts have asked the UPU to file [the] Objection [...] is not supported by any evidence’”, neither is the allegation that China Post, Macao Post and South Africa Post have separately expressed their support against the Application (Response, p.7 and Annex 13).

58. Amazon argues further that the allegation by the Objector that Brazil Post and Poste Maroc together with other Posts have expressed their opposition through their Member-Country’s GAC representative is no more than previous allegations supported by evidence. “Only one GAC Early Warning has been issued, namely by the Australian representative (Annex 14) who issued 129 Early Warnings in total involving various gTLDs (Annex 15)” (Response, p.7). However, that Early Warning was more of a general nature, the GAC representative being concerned that the Applicant would be seeking “exclusive access to a common generic string (.MAIL) that relates to a broad market sector” (Response, p.8).

59. In addition, Amazon disagrees with the Objector's statement that "the mere filing of the Objection" would be demonstrating substantial opposition from the community invoked (Response, p.7).
60. The number of public comments against the Application claimed by the Objector is a "gross exaggeration" since no Public Comments were issued by the Brazilian Post. Only three postal operators (USPS, Poczta Polska and Poste Italiane) have issued Public Comments against the Application (Annexes 9-12) which are in reality identical comments, therefore duplicative and redundant. Out of these comments, only one by Poczta Polska and one by Poste Italiane, did refer to the Community Objection Ground. The USPS' comments were not based on the community objection ground. None of these two Posts are representative since Poczta Polska's market share is decreasing (Annex 17) and Poland's postal market is among the smallest in the EU (Annex 18). Poste Italiane competes with a multitude of other market players (Annex 8) and there is a lack of recent statistical data to understand Italy's position in the European postal market (Annex 18) (Response, p.9).
61. Turning to the USPS' opposition, Amazon argues that USPS is not representative for either the US postal market, or for the global postal sector, since it is unclear on which basis the statistics provided by USPS have been computed. USPS does benefit from a monopoly for letter-post in the US, but USPS may use external operators for pre-delivery operations (Response, p.9). In addition, USPS does face competition on the US market (Annex 20) and its market share varies considerably depending on the kind of services taken into consideration (Response, p.10 and Annex 21).
62. To confirm that lack of substantial opposition, Amazon files Annex 16 which is the GAC's Communiqué (Beijing, 11 April 2013) including Advice to the ICANN Board on New gTLDs with an Annex I entitled "Safeguards on New gTLDs". Amazon reads this document to mean that the GAC "did not advise that the Application should not proceed"; "did not list the Application as a string that is linked to regulated or professional sectors"; "solely mentioned that exclusive registry access to the .MAIL string **should**<sup>5</sup> serve a public interest goal" (Response, p.8). However, says Amazon, "This advice is a non-binding request to the ICANN board. It is in no way a request that the Application should not proceed; at most, the GAC asked for taking up some additional provisions in the registry policies" (Response, p.8).

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<sup>5</sup> Emphasis in the original.

**3. There is no strong association between the community invoked and the .mail string**

63. Amazon's Response to the Objection on this point is very short (less than a page). It argues that in an electronic context, and in various parts of the world, mail refers to electronic mail (Annexes 22 to 25). Therefore, the Internet users will associate 'mail' to electronic mail rather than to physical mail (Response, p.11).
64. In addition, Amazon contests that the Postal services are regulated in the way presented by the Objector (Response, p.12).

**4. Amazon's application does not create a likelihood of material detriment**

65. Amazon mainly presents three arguments in response to the Objector's position on this question. 1) The .MAIL string is not targeted to the 'Postal Community' as described by the Objector, the postal sector being much larger and the meaning of 'mail' being much broader and not targeted to the postal sector; 2) The Application is not damaging the postal sector, as it is not targeting the postal sector; 3) even if the Application was targeting the postal sector, *quod non*, it would not materially detriment the rights or legitimate interests of the community invoked (Response, p.12).
66. Amazon emphasises that it intends to "provision a relatively small number of domains in the .MAIL registry to support the business goals of Amazon" (Response, p.12 and Annex 27). In addition, "Amazon's business goals are not targeted at bringing harm to the postal sector" (Response, p.13). In fact, Amazon argues, Amazon's e-commerce business generates additional shipments for postal operators who benefit from it (Response, p.13).
67. Contrary to the Objector's argument, 'mail' and 'post' are not interchangeable and no confusion can derive from the .mail string, since both "the names and the purposes of these gTLDs are sufficiently distinct for the Internet user to understand the differences between .POST and .MAIL" (Response, p.13 and Annexes 28 & 29). Further, since the .MAIL gTLD "is to support the Applicant's e-commerce business, there is no risk of interference with the core activities of the community invoked by the Objector" (Response, p.13).
68. Amazon argues also that the Objector's argument concerning trust is misplaced. Indeed, the same study invoked by UPU (the Ponemon Institute study, Exhibit 16 and Annex 30) ranks the Applicant "third, with a seven year average rank of 4.4 whereas USPS is ranked fourth, with a seven year average rank of 6.0" (Response, p.14). Amazon notes in addition that "it will implement appropriate privacy policies respecting requirements of local jurisdictions

and that it is a participant in the Safe Harbor program developed by the US Department of Commerce and the European Union”, and that it will use DNSSEC as well, which is required for all new gTLDs (Response, p.14).

69. Finally, Amazon is of the opinion that the community’s core activity invoked by UPU, does not depend on the DNS and that there is no concrete economic damage.
70. Consequently the Objector did not meet the final test for the Community Objection as there is not likelihood of material harm.

#### **IV. THE FINDINGS OF THE EXPERT PANEL**

71. The Expert Panel will examine consecutively the four tests outlined above<sup>6</sup>.

##### **A. Does UPU have standing?**

72. In order to decide on this question, the Expert Panel must answer two separate questions: 1) Does the Objector invoke a “clearly delineated community? 2) Is the Objector an Established Institution?

##### **1) Does the Objector invoke a “clearly delineated community”?**

73. In order to decide on the first test, i.e. whether the community invoked by the Objector is a “clearly delineated community”, the Expert had first to find out what is a “community” in the meaning used by ICANN.
74. Module 3 proposes five (5) factors which, *inter alia*, an Expert Panel could balance to decide on the first test, but none of these factors readily defines what a community is. Hence, the Expert had to resort to other sources.
75. After due consideration of the Parties’ submissions and of the general public debate which this notion has triggered, the Expert decided that the best definition of what is a community, for the purpose of a Community Objection, is the one found in the ICANN 2007 Report. This definition is as follows: “Community should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community. It may be a closely related community which believes it is impacted.” (p.5 of the online document and Recommendation 20).

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<sup>6</sup> See paragraph 24.



76. It is true that the NCUC Minority Statement criticizes the definition and the guidelines by saying that allowing a broad definition of the concept of community allows “for the maximum number of objections” (Annex C to the ICANN 2007 Report, p. 21 of the on-line document). Further it explains that “there is no requirement that the objection be reasonable or the belief about impact to be reasonable. There is no requirement that the harm be actual or verifiable. The Standard for ‘community’ is entirely subjective and based on the personal beliefs of the objector” (same reference).
77. The Expert Panel is of the opinion that, notwithstanding the criticisms expressed towards the definition proposed by ICANN, such definition is the best possible to match the philosophy of community objections as expressed above<sup>7</sup>.
78. UPU says that the community it invokes is the “Postal Community” (Objection p.6 and several times thereafter). However, in the same paragraph, it also says that “the public is directly affected by the proposed operation of a .mail TLD that does not originate from a trusted governmental source and does not actually provide any regulated mail services”. Therefore, there is some doubt about what is the exact delineation of the community invoked by UPU. Is it the Postal Community? Is it the public at large?

*a) The Postal Community*

79. It is now necessary to decide whether the “Postal Community” invoked by the Objector is of such a nature as required for a “clearly delineated community”. The Objector explains that the Postal Community invoked is composed of its Member States (i.e. 192 States as of 1 Dec. 2011) and of the 199 Posts (Objection p.16 and Exhibit 1). In other words, the Postal Community invoked by UPU has the same composition as the UPU itself.
80. Amazon argues that “in reality, the ‘community’ invoked by the Objector is composed of one entity, namely its own organization (Response p.5). Amazon relies on the fact that competition in the field of postal services is growing in the world and that privatization has taken place already for many years. Indeed, Amazon argues, private companies such as DHL, UPS, TNT and FedEx, propose services which, once upon a time, were the monopoly of governmental entities. This is no more the case. Amazon argues further that none of these private companies are represented by UPU.
81. The Expert Panel can only note with approval that, indeed, services akin to postal services are nowadays performed by private companies which compete with the traditional public

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<sup>7</sup> See paragraph 27.

postal services. However, the Expert finds that Amazon’s argument fails short of proving the point it is trying to make. Indeed, if one agrees that there are now both private and public companies which offer postal services, UPU does not pretend to represent the entirety of these companies. In fact, when one considers the market of postal services in 2013, it is clear that it is divided into two communities: the first one is the traditional postal community composed of public entities which, for the sake of this Determination, will be called the “public sector postal community”; the second one may be composed of the private companies mentioned by Amazon plus any other which perform similar services, which could be called the “private sector postal community”<sup>8</sup>. UPU pretends only to represent what the Expert just called “the public sector postal community”.

82. Amazon argues further that the public sector invoked by the Objector is only “a small fraction” of the postal sector (Response p.6). However, nowhere in Module 3 is the Expert directed to decide whether the Objector represents a majority of the community or a large majority of the community<sup>9</sup>. The only test is whether the community is “clearly delineated”. Hence, Amazon’s argument does not change the determination made by the Expert above that there are two separate, clearly delineated, communities in the postal industry. Therefore it is not necessary to decide whether the public sector postal community is smaller than the private sector postal community, as Amazon seems to argue. In any case, even if the Expert were to take that route, *quod non*, Amazon does not propose a clear set of factors to decide which community is larger. Hence, the Expert cannot and may not engage in the calculation of whether the private sector operators’ services are larger than those from the public sector operators. In any case, Amazon does not propose any criterion to proceed with such a calculation (number of employees? number of vehicles? number of offices? number of clients? turnover? all of them? others?) which, in any case, would be sterile in view of the test requested by the standards provided by Module 3.
83. Amazon further argues that the Objector invokes “an artificial fraction” of the postal sector (Response p.6). The Expert finds no artificiality in the fact that UPU has been set to represent its Member countries and the designated Postal Offices that these countries have nominated. In fact Amazon confuses two different concepts. 1) The postal sector or postal industry, on the one hand, which is composed of both public and private operators since the

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<sup>8</sup> Whether these private companies do form a community in the ICANN meaning of the concept remains to be demonstrated. This demonstration falls outside the scope of this Determination and is not necessary for it.

<sup>9</sup> This argument is probably more relevant for the analysis of the second test below. See paragraphs 90 & ff.

liberalization of postal services; 2) the Postal Community invoked by UPU, on the other hand, which is composed of the public operators only. The Postal Community is, therefore, a clearly delineated community for the purposes of a Community Objection.

***b) The public at large***

84. The difficulty for this first test is one that Amazon has not really focused on but is clearly apparent in UPU's arguments. Indeed, while UPU does claim that it represents the Postal Community composed of public sector operators, it then proceeds to make references, all along its Objection to the "public" or "the global public" (notably Objection p.9).
85. Considering the definition the Expert Panel has retained for the concept of "community" it does not seem that the public at large can be considered as a community so that to invoke a "clearly delineated" one, which is the test to be decided. This is not to say, however, that the public at large is completely outside the scope of the decision. Indeed, as will be explained later in this Determination<sup>10</sup>, the public must be taken into consideration for the analysis of the fourth test, but the public at large, as claimed by UPU, is not the proper factor to be taken into consideration for the first test.
86. Having said that, however, this caveat does not change the Expert Panel's conclusion that UPU invokes a clearly delineated community.
87. For the reasons explained above, the Expert Panel is of the opinion that the Objector has met the burden of proving that it represents a clearly delineated community.

**2) Is UPU an "established institution"?**

88. There is no doubt that UPU is an Established Institution (Objection p.5, 8 and 9) and fulfils the criteria mentioned in section 3.2.2. of Module 3. This is not contested by Amazon and needs no further examination.

**3) Conclusion on the first test**

89. The Objector has met the requirements of the first test.

**B. Is There a Substantial Opposition by the Community?**

90. For the second test to succeed, the Objector must show that the "Community opposition to the application is substantial". Module 3 (at section 3.5.4., p. 3-23) suggests that the Expert

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<sup>10</sup> paragraphs 117 & ff.

Panel could take into consideration, *inter alia*, the number of expressions of opposition; the representative nature of entities expressing opposition; the level of recognized stature or weight among sources of opposition; the distribution and diversity among sources of expressions of opposition; the historical defense of the community in other contexts and the costs incurred by the objector in expressing opposition.

91. In addition ICANN has warned Expert Panels that “the public comment forum should not be used as a mathematical polling mechanism [...], the quantity of comments is not in itself a deciding factor.” (Annex 1, p.37).
92. This is why the Expert Panel decided to look at three elements: 1) the opposition by the public at large; 2) the opposition by UPU’s members, i.e. the Postal Community invoked by the Objector; 3) the opposition by UPU itself.

1) Expression of opposition by the public at large

93. Based on its 2011 Annual Report (Exhibit 6) UPU argues that the Postal Community it represents delivers mail to “82% of the world’s population or more than 5 billion people” (Objection p.9 and Exhibit 5). In addition, UPU emphasizes that the Postal Community concerns 5 million postal employees and 663 000 postal offices around the world (Exhibit 5). These figures are not contested by Amazon in any material way. However, they are not interesting as such for the decision to be taken on the second test. Indeed, it would have been more cogent if UPU had successfully triggered a large public campaign against the attribution of the .mail TLD to one or more private companies. Nowadays, with the Internet, such campaigns are easy to launch. Nothing similar has been evidenced by UPU.
94. It is true that UPU is an intergovernmental organization and, as such, thought it more appropriate to rely on its members.

2) Expression of opposition by UPU members

95. This is why UPU files a number of oppositions expressed by some postal administrations or offices during the public comment period opened by ICANN (Exhibit 7). Exhibit 7 comprises copies of all oppositions filed, not only against Amazon’s Application, but also against applications by other companies. For the present case, the Expert Panel took into consideration only the opposition expressed against Amazon’s Application, i.e. pp. 27 to 39 of Exhibit 7 and Annexes 9 to 12).
96. The Expert Panel can only notice, together with Amazon, that the content of Exhibit 7 does not match the text of the Objection itself. UPU argues, for example, that “Brazil Post” and

Poste Maroc have expressed opposition to the Application (Objection p.10). However, the Expert Panel could find no evidence of such an opposition in UPU's file for the present case. Brazil Post has filed one comment but for a different application. In addition, contrary to other postal services (for example the USPS or Poste Italiane), it has not considered important enough to replicate its comment for the other applications, even though ICANN's guidelines make it clear that comments should be made for each application (see Annex 12). Poste Maroc has filed a very brief comment saying that it agrees with the USPS, but it did so against another application which has now been withdrawn. Poste Maroc, like Brazil Post, has not considered it to be important enough to duplicate its comment against Amazon's application.

97. UPU also argues (Objection p.10) that "China Post and Macao Post separately expressed their support for the Public Comments filed against the Application. South Africa Post has equally stated its opposition to the Application". Notwithstanding this allegation, the Expert Panel notes that UPU's file does not show any evidence of such an expression and Amazon having researched the Public Comments made in conjunction with the .mail TLD could find no comments coming from any of the three Posts mentioned by UPU (Annex 13).
98. UPU further argues that "a number of Posts have expressed their opposition ... through their Member Country's Governmental Advisory Committee (GAC) representatives" (Objection p.10). Again, as Amazon points out, UPU's file does not contain any evidence supporting such an allegation. Amazon's research on GAC's documentation reveals no such opposition (Annexes 14 and 15).
99. Amazon files a GAC Communiqué released in Beijing on 11 April 2013 (Annex 16) which mentions no opposition from specific members of GAC and no decision to oppose the .mail string, contrary to a number of other strings such as .shenzhen, .persiangulf, .date, .spa etc..., (see p.3 of Annex 16).
100. Further, out of the 80 or so public comments claimed by UPU to have been filed with ICANN during the public comment period, a large part of them have been filed by the same Posts, in similar or identical terms (see, for example, the comments by Poste Italiane and USPS) for different applications. Against Amazon's application UPU filed 3 comments by Poste Italiane written in identical terms; 1 comment by Poczta Polska S.A. and 9 comments by USPS.

101. It is true that, as recalled in paragraph 91 above, an analysis of public comments may not be made only on a mathematical basis. However, the Expert Panel is compelled to note that out of the 199 Posts claimed to compose the Postal Community by the Objector, only a very small number have felt the need to express oppositions. Having said that, UPU's next argument is that the opposition by USPS is a very heavy opposition because of the weight represented by that postal service within the Postal Community.
102. Indeed, UPU relies heavily on the one opposition by the USPS and seems to claim that, by itself, it does represent a substantial opposition. UPU exposes, without being contradicted by Amazon, that the USPS handles more than 40% of the world's mail volume (Exhibit 8)<sup>11</sup>. These figures are certainly impressive but fall short of demonstrating that a substantial portion of the Postal Community has expressed opposition to Amazon's application for the .mail TLD. In fact, even if USPS does represent a large portion of the world's mail volume, this is not sufficient to prove a "substantial" opposition from the Postal Community. The level of evidence required by ICANN, considering the philosophy restated above<sup>12</sup>, is higher and the Expert Panel needs to find that other sources of opposition exist.

3) Expression of opposition by UPU itself

103. UPU further argues that "in order to file this Objection, several Posts have asked the UPU to file this Objection with the approval of the UPU Director General (Objection p.10). UPU offers no evidence of this fact in its file. On the contrary, UPU argues simply that "the filing of this Objection by the UPU on behalf of the Postal Community alone demonstrates substantial opposition to the Application from the Postal Community" (same reference).
104. The Expert Panel doubts this assertion. Indeed, UPU's General Regulations (Exhibit 3) do propose a set of clear rules concerning the bodies of the organization. Apart from the Congress (what other organizations would call their general assembly) which meets every four years, the organization is run by a Council of Administration (art. 17) whose functions include: "to consider and approve, within the framework of its competence, any action considered necessary to safeguard and enhance the quality of and to modernize the international postal service" (art. 102, section 6.2.). The Council is composed of 41 members (art. 102). It would have been possible, for the UPU Director General, to call the attention of the Council to the new gTLDs process and the necessity to act against the .mail TLD. There was plenty of advance warning posted by some GAC's members. There were

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<sup>11</sup> Information confirmed at p.44 of Annex 20.

<sup>12</sup> See paragraph 27.

plenty of consultation periods all along the process. However, UPU does not evidence that such an action was ever taken.

105. The First Additional Protocol (24<sup>th</sup> Congress 2008 Geneva, also in Exhibit 3) empowers the UPU Chairman to carry out the Council of Administration's duties, in between sessions, in case of urgency. However, UPU does not show that the filing of the Objection has been authorized in this manner.
106. In addition, it is doubtful that the filing of the Objection would fall within the competence of the International Bureau or of its Director General. The list of duties of the Director General, provided by Art. 112 of UPU's General Regulations, shows that the great majority of them are administrative in nature. The Director General does not seem to have the power to act on its own initiative. Perhaps, with a broad interpretation, it could be said that filing the Objection could have fallen within the Director General's duty under section 2.6. of Article 112 which provides that the Director General is entitled: "to take action to achieve the objectives set by the bodies of the Union, within the framework of the established policy and the funds available". However, a stricter interpretation would lead to saying that the Director General may not act *sua sponte*. This stricter interpretation is in fact in line with the text of the Objection itself, where UPU felt compelled, as stated above, to argue that "several of its members have asked it to file this Objection". If UPU Director General had the power to act *sua sponte*, UPU would not have said that some of its members had asked it to file the Objection. In any case, as said before, the allegation according to which UPU's members have asked the Director General to file the Objection is not accompanied by any evidence.
107. For that purpose, the power of attorney filed by UPU is of no use since it only shows that the Objection was filed "with the approval of the UPU Director General". It does not provide the source of the power of the Director General to approve such filing.

#### 4) Conclusion on the second test

108. Considering the small number of Posts which have filed public comments (even if one includes Poste Maroc and Brazil Post), and considering that it is doubtful that UPU's Director General has the power to act *sua sponte*, without at least a clear mandate of the Chair of the Council of Administration, UPU has not met its burden of proof with respect to the second test.

### **C. Is There a Strong Association?**

109. For the third test, the Objector must prove a strong association between the community invoked and the applied-for gTLD string. This test is further characterized as “targeting” in section 3.5.4. of Module 3. The factors which the Expert Panel, *inter alia*, could take into consideration are the statements contained in the application, other public statements by the applicant and the associations by the public.
110. UPU argues that the word “mail” corresponds to an “inherently governmental function” (Objection p.12) and that if the Applicant was granted its Application, it “would be skipping over the entities that actually provide mail services” (Objection p.13). UPU argues further that the public associates ‘mail’ with the Postal Community and that “in most countries, ‘mail’ sometimes referred to as ‘post’, is a regulated industry that refers to the delivery of hardcopy correspondence” (Objection p.12). Finally UPU argues that this is a matter of trust by the public.
111. Amazon argues, on the contrary, first that “Internet users will associate ‘mail’ to electronic mail rather than to physical mail (Response p.11 and Annexes 22 & 23). Second, “the word ‘mail’ has become a dictionary word in French, German and Dutch<sup>13</sup>, referring to ‘email’ (Annex 24). Third, in English, the word ‘mail’ is used as ‘email’ (Annex 25)<sup>14</sup>. Finally, Amazon argues that the postal services are not regulated in the way presented by the Objector. “The market for postal services has been liberalized in many countries, whereby only a small fraction of services is guaranteed through government intervention. States tend to stimulate new market entrants rather than to preserve governmental or quasi-governmental monopolies” (Response p.12).
112. It is not entirely clear to the Expert Panel whether the arguments presented by both the Objector and the Applicant about the confusion between “mail” and “post” are really relevant to address the third test examined here. Indeed, the Expert Panel understands the test as requiring that the community invoked is directly targeted by the new generic TLD proposed. Hence, the Panel has to decide whether the Postal Community is indeed targeted by the application for the .mail gTLD.

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<sup>13</sup> In Annex 24, however, the word « mail » is first explained as « post » and only as “email” in the second rank meaning. In the German dictionary, e-mail and e-post are equated, hence giving more weight to UPU’s arguments.

<sup>14</sup> Annex 25 shows that « mail » in the meaning as e-mail comes only as the third meaning, the first meaning being : « material sent or carried in the postal system » (see pp. 3 and 7 of Annex 25).



113. Independently to what will be decided for the fourth test below about the potential public confusion between the classic, physical mail and the future Internet .mail services, if Amazon's Application is granted, there is little doubt that the .mail TLD future services are targeting the Postal Community since mail services is the bulk of the services that the Postal Community provides. This is particularly true for the USPS which is a pure player (Annex 20, p.42 & ff.), unlike the French La Poste which offers other services such as financial services.
114. Amazon's file itself (Annex 16) emphasizes the need for public interests goals to be taken into consideration. Indeed, the GAC does advise ICANN Board that: "For strings representing generic terms, exclusive registry access should serve a public interest goal" (Annex 16 p.11). Among the strings concerned by this advice, .mail is mentioned. It does show, therefore that there is a strong association between .mail and the interests represented by the Postal Community invoked by the Objector.
115. Moreover, it appears clearly (Annex 27) that the Applicant's intention is to operate the .mail TLD as a "closed TLD", i.e. for its own purpose only<sup>15</sup>. This will give the Applicant a competitive advantage which may be incompatible with the broad concept of 'mail'. The simple fact that the Applicant proposes to use the .mail TLD as "closed generic" is sufficient to prove that indeed there is a strong association between the community invoked and the .mail application.
116. Considering the above, the Expert Panel is of the opinion that UPU has met the requirements for the third test.

#### **D. Does the Application create a likelihood of material detriment?**

117. Section 3.5.4. of Module 3 explains that the Objector must prove that there is a likelihood of material detriment "to the rights or legitimate interests of a significant portion of the community invoked". In order to analyze this test, the Expert Panel, *inter alia*, may take into consideration the nature and extent of damage to the reputation of the community; the evidence that the Applicant is not acting or does not intend to act in accordance with the interests of the community or the users more widely; the interference with the core

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<sup>15</sup> The Expert Panel is aware of the on-going debate about the so-called « closed gTLDs ». ICANN realized that this concept was not taken into consideration when it prepared its Applicant's Guidebook which forms the basis for decisions in the matter of new gTLDs. ICANN did open a public comment period between 5 February 2013 and 7 March 2013 (See the press release at <http://www.icann.org/en/news/public-comment/closed-generic-05feb13-en.htm>.)

activities of the community; the dependence of the community on the DNS for its core activities; the nature and extent of concrete or economic damage to the community; the level of certainty that alleged detrimental outcomes would occur.

118. UPU argues that the Applicant's operation of the .mail TLD "would substantially damage the Postal Community's reputation by failing to meet public expectations regarding the reliability, privacy and security of "mail", which have been established through great effort by the Postal Community" (Objection p.14) and "threatens to interrupt the smooth and secure provision of mail services" (Objection p.8). Further, UPU argues that Applicant's does not "intend to act in accordance with the interests of the Postal Community and does not intend to institute effective security protection of user interests" (Objection p.16), while "international mail standards [established by UPU] are critical to the successful handling and delivery of all international mail" (Objection p.9). Finally it argues that the Applicant's intended operation of the .mail TLD will interfere with the core activities of the Postal Community which do depend on the DNS for its core activities and will suffer concrete and economic damage (Objection p.17-19) because 'mail' represents "secure communications and transactions" for the public, because "many national laws mandate a high level of security and privacy for mail" (Objection p.14-15 and Exhibits 5, 14, 15 and 16). UPU argues that "the public is likely to view the .mail TLD as identifying members of the Postal Community, much in the same way as '.int' identifies only international treaty-based organizations, '.gov' identifies only US government organizations and '.post' identifies only verified providers of mail products and services and other members of the global postal community" (Objection p.16).
119. UPU's argument is essentially one of confusion by the users between the secured mail services provided by postal services around the world and the services which will be provided by .mail websites. This confusion, says UPU, could be such that the .mail TLD "could become overrun with third parties trading off the goodwill of the Posts for illicit purposes and harming both the public and the goodwill of the Posts". The premise of UPU argument is that the terms "mail" and "post" are interchangeable (Objection p.12, 17 and 18).
120. Amazon argues, essentially, that because "the mission and purpose of the .mail gTLD is to support the Applicant's ecommerce business, there is no risk of interference with the core activities of the community invoked by the Objector" (Response p.12 and Annex 27). Amazon further contests that the terms "mail" and "post" are interchangeable. On the

contrary, they “are sufficiently distinct for the Internet users to understand the differences between .post and .mail” (Response p.13). Further Amazon argues that “case law is clear that as ‘online commerce becomes commonplace’, the default degree of consumer care is becoming more heightened” (Response p.13 and Annexes 28 & 29).

121. The Expert Panel considers there are four issues to be analysed here : 1) The users’ potential confusion between “mail” and “post”; 2) The harm to the reputation of the Postal Community; 3) The lack of security in the .mail Application; 4) The material economic damage suffered by the Postal Community.

1) The users’ potential confusion between “mail” and “post”

122. The battle of arguments between the Objector and the Applicant on this issue is clearly one of “*anciens*” and “*modernes*”, similar to what occurred in the French intellectual life in the late XVIIIth century. The battle bounces every so often, each time there is a new approach to some societal evolution. It is still referred to nowadays to signify that some persons in a society have difficulties accepting more modern ways of doing things. This is not to say, of course, that modern ways are always better and more appropriate to follow, but there is certainly something of that battle in the discussion between the Objector and the Applicant over whether the term “mail” is confused with “post” by users.

123. The Expert Panel has analyzed carefully all the dictionary and encyclopedia entries filed by the Objector (Exhibits 10 to 13) and the Applicant (Annexes 22 to 25). Almost all entries, even some of those filed by the Applicant, do mention either as a first meaning or as a second or third meaning that “mail” is meant to be “letters and packages conveyed by the postal system” or equate “mail” with “post” (See Exhibits 10 to 13 and Annex 25). By contrast, the first ten results appearing on the lists of various search engines do not show the word “post” or the words “postal service” as an equivalent to “mail” (Annexes 22). As was to be expected, Wikipedia in French, Dutch and German equate “mail” with e-mail” (Annex 23). More surprisingly, recent dictionaries in French, Dutch and German do the same (Annex 24).

124. From that analysis, it appears that the analogy which may have been made in the past between “mail” and “post”, is now progressively vanishing. However, this is not enough to show, for certain, whether users are now and will in future confuse “mail” with “post” with all the consequences described by UPU in its Objection if the .mail string is attributed to the Applicant.

125. Indeed, as the Circuit Court for the Ninth Circuit has done (see Annexes 28 and 29), even though it had to decide a trademark case (which is different from the present determination), some finer analysis is needed when it comes to users' potential confusion. For example, the Expert Panel agrees with the Court of the Ninth Circuit, that "the degree of consumer care is becoming more heightened as the novelty of the Internet evaporates and online commerce becomes commonplace". The Court further determined that "it was unlikely that a reasonable, prudent consumer would be confused into believing that a domain name that included a product name would necessarily have a formal affiliation with the maker of the product [...]".
126. Therefore, it is less probable that Internet users today would be likely to confuse "mail" with "post", contrary to what the Objector argues. This may have been different a few years ago when electronic mail was introduced. Indeed, some users may have been surprised to learn, after having established an electronic mail box and after having used it for some time, that the messages received and sent via that box could be hacked and the box taken over by Trojan horses and other non-invited intruders. The Expert Panel is of the opinion that this time is slowly coming to an end, not so much because "mail" has become a common word even in a French<sup>16</sup>, German or Dutch dictionary, but because the mentalities have evolved with the progressive use of the Internet and the added sophistication of users. Nowadays, users do know that the use of the Internet for their correspondence does not provide them with a level of safety equivalent to the one that they enjoy for their physical correspondence. It is indeed doubtful, that users will, tomorrow, attribute the same faith to .mail websites as they do to postal services. It is also doubtful that they would attribute more faith to .mail websites and mail boxes, than they do today to gmail, hotmail or any other Internet services which use already the word "mail" in their name.
127. Of course, one must not look at Internet users only in western, developed countries and "users" in the meaning of section 3.5.4. of Module 3 should encompass all kinds of users. However, the Expert Panel was given no evidence that even in less developed countries, the confusion between "mail" and "post" would be widespread. The increased use of the Internet and mobile phone services in some less developed countries shows the sophistication that these societies have reached, which is even sometimes higher than in western societies.

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<sup>16</sup> In French, the word « mail » has been known since around 1000 and designates originally either a hammer (its latin origin) or a promenade. It now has the third meaning of "electronic mail" which was introduced only very recently into the dictionary.

128. Considering the above, it is doubtful that users will indeed confuse “mail” and “post” if there are, in the future, websites associated with the .mail string.

2) The harm to the reputation of the Postal Community

129. It is not at all evident, from the Objector’s evidence, that indeed a .mail TLD will be run in a harmful manner to the Postal Community. In fact, most of UPU’s arguments are very speculative in nature.

130. UPU heavily relies on the fact that postal services are a regulated industry to support the argument that, if the application for the .mail string is granted, its operation will bypass rules and regulations which have been in place for many years. This argument appears specifically in Poste Italiane’s, Poczta Polska’s and USPS’s public comments. To take the words of Poczta Polska: “For example, the average, reasonable consumer may be misled into believing that the unregulated owners of the .mail TLD and second level domains conform to the same industry standards as their country’s governmental regulated postal administration when, in fact, they do not.” (Exhibit 7).

131. However, several arguments run contrary to UPU’s and the Posts’ position.

132. In the first place, postal services have, for a long time, been divided between public and private operators. This is acknowledged by UPU’s website and the historical background provided in other UPU documents. It is true that the public sector has taken over from approximately the end of the XIXth century until at least the first half of the XXth century<sup>17</sup>. However, the trend towards liberalization of postal services (Annexes 4 to 8, 18 and 21) has not given rise to major problems. Hence, privatization and more competition do not automatically lead to less regulation or protection.

133. Secondly, the GAC Communiqué already mentioned (Annex 16) covers in its Annex I the question of gTLDs which are linked to “Regulated Markets” (Annex 16 p.8). It says: “Strings that are linked to regulated or professional sectors should operate in a way that is consistent with applicable laws. These strings are likely to invoke a level of implied trust from consumers, and carry higher levels of risks associated with consumer harm”. It adds that such strings should contain a number of safeguards, notably “Registry operators will [...] comply with all applicable laws, including those that relate to privacy, data collection, consumer protection [...]”. However, in the list that follows, which includes the strings to which the safeguards should apply, the .mail TLD does not appear. It is true that the list is

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<sup>17</sup> Probably with the exception of the UK, as shown by Exhibit 12.

expressly non exhaustive, but as of 11 April 2013, the GAC did not think that the .mail string was related to a regulated sector. In itself, this is meaningful. In any case, even if later the GAC does realize that the .mail string is linked with a regulated sector, its advice clearly shows that this is not a sufficient reason to block altogether the attribution of the string, but it recommends that registry operators do not bypass applicable rules and regulations. It further recommends that registry operators “establish a working relationship with the relevant regulatory, or industry self-regulatory bodies, [...]” (Annex 16 p.8). In the case of Amazon, the description of its proposed management of the .mail string (Annex 27 and Exhibit 9) shows an intention to act accordingly.

134. Even if one would accept that there is a potential harm to the Postal Community, that potential harm being identified in the arguments of UPU, it will be up to ICANN to follow the recommendation of the GAC so that regulations be scrupulously complied with by registry operators.

3) The lack of security in the .mail Application

135. This is probably the most important concern voiced by the Objector. This concern is not specific to the new gTLDs but is a recurring one with the Internet. The Objector exemplifies the level of privacy and security enjoyed by the mailing system offered by Postal services around the globe and files three regulations (USA, the UK and Canada) (Exhibit 14) and one press release concerning the Sao Paulo and Curitiba Posts in Brazil (Exhibit 15). In addition, the Objector files the Ponemon Institute 2012 study on the Most Trusted Companies for Privacy (Exhibit 16), also filed by Amazon as Annex 30, which shows that USPS is ranked fifth among the 10 most trusted companies.
136. The concern is particularly important as to the phenomenon called “data mining” which has probably been experienced by any person who has used the Internet either for some purchase of goods or services or when their mail box has been hacked.
137. Amazon answers that the Ponemon Institute’s study referred to by the Objector (Exhibit 16 and Annex 30) actually ranks Amazon higher than the USPS. The Expert Panel is not certain about the exact conclusion to be drawn from this study as the methodology used by the Ponemon Institute is unclear. Having said that, it seems that the Ponemon Institute’s study is fairly neutral and establishes neither the argument the Objector is trying to make nor the Applicant’s argument.

138. The fact that Amazon proposes to manage privacy issues according to the Safe Harbor principles contained in the agreement between the United States and the European Union (see p.8 of Annex 27) is not particularly reassuring for the average citizen, knowing all the privacy issues which have been publicized in the years since that agreement has been executed<sup>18</sup>.
139. Considering the above, and if ICANN goes ahead with the .mail string, it will have to make particularly clear that the registry is indeed managing the string with heightened security and privacy.

4) The material economic damage suffered by the Postal Community

140. Although UPU does not express it in this exact manner, it is to be expected that allowing a .mail TLD will increase the falling in mail volumes already experienced by Postal services around the world. Annex 20, i.e. ARCEP Report on ARCEP's Mission to the United States, and Annex 18, i.e. the Eurostat Postal Services statistics, filed by Amazon, are telling in this respect. The ARCEP Report mentions that mail volumes have dropped by 20% since 2006, due partly to the advent of e-mail (p.46 of Annex 20). In addition, the projection is that in 2020, the mail volume will drop to the level of 1986. This trend will only increase if the .mail TLD goes forward.
141. However, the Expert Panel has noticed that Amazon does insist that it will run the .mail registry as a "closed TLD" only for its own business purposes (Annex 27, notably answers to questions 18b and 28). Therefore, it remains unclear how this purpose will impact the economic market of the mail and postal services around the world.
142. UPU also argues that the establishment of a .mail TLD will run to the detriment of the .post sponsored TLD. UPU offers no evidence in support of this argument. For example UPU does not say how much revenue, if any, the .post TLD generates for UPU and/or the postal industry around the world. Without those figures, the argument is speculative in nature. In addition, because the Applicant proposes to operate the .mail TLD as a "closed TLD", it seems that the economic harm could be minor.
143. Although the extent of the economic harm is uncertain considering the Applicant's intentions, the harm is probable and satisfies the requirement that there be "a likelihood of material detriment" under Section 3.5.4. of Module 3.

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<sup>18</sup> This is public knowledge and one may consult regularly the websites of the European privacy protection agencies to find out the difficulties experiences with the Safe Harbour agreement.

5) Conclusion on the Fourth test

144. The harm is probable. However, most of the concerns expressed by the Objector can be met and corrected by a sound policy taken by ICANN and solid rules to implement that policy and control its application.

**V. FINAL CONCLUSION BY THE EXPERT PANEL**

145. For each of the four tests which the Expert Panel had to run in order to decide on the Objection, the Expert Panel finds as follows:

- UPU has standing as it is an established institution which has an ongoing relationship with a clearly delineated community.
- The Objection does not appear to be substantial.
- The Application clearly targets the Postal Community.
- The material detriment to the community invoked by the Objector is probable. The privacy and security issues can be easily addressed by ICANN if it decides to go ahead with the attribution of the .mail TLD. The economic harm is probable and may be avoided only if the .mail TLD is not attributed.

146. Considering the above conclusions for each of the four tests and the strict rules established by ICANN, the Expert Panel has no other possibility that either reject or accept the Objection (Procedure, Art. 21 (d)). In addition, as stated above, the Objector bears the burden of proof and the four tests are cumulative, i.e. if the Objector misses only one test, the Objection must be rejected. Therefore, because the Objector has not brought enough evidence on the second test, the Objection must be rejected.

147. The additional request by the Objector to reject “all other current and future applications for the .mail TLD” (Objection p.19), is dismissed pursuant to Articles 2(e)(iv) and 21(d) of the Procedure, the Expert Determination being limited to deciding on the specific application which is the subject of the proceedings.



## **VI. EXPERT DETERMINATION COSTS**

148. Pursuant to Articles 14(e) and 21(d) of the Procedure, the Expert Panel is compelled to follow the “costs follow the event” rule “”. One may regret the automaticity of the rule, particularly with regard to the complexity of the issues raised by the Objector and the Applicant. The lack of flexibility does not allow the Expert Panel to take into consideration the nuances of the Determination and the fact that the Objector raised issues which are far from being frivolous. *Dura lex, sed lex!* The Objection being rejected, albeit with many caveats, the Objector has to bear the entire costs of the proceedings.

## **VII. DECISION**

149. For the above reasons, and accordance with Article 21(d) of the Procedure, I hereby render the following Expert Determination:

- 1.** UNIVERSAL POSTAL UNION’s Objection is rejected;
- 2.** The Applicant, AMAZON EU S.A.R.L., prevails;
- 3.** AMAZON EU S.A.R.L.’s advance payment on costs shall be refunded by the Centre.

Place of the proceedings: Paris, France

Date: 20 January 2014

Professor Catherine Kessedjian  
Expert