

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

CASE No. EXP/422/ICANN/39

EUROPEAN STATE LOTTERIES AND TOTO ASSOCIATION

(SWITZERLAND)

vs/

AFFILIAS LIMITED

(IRELAND)

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 – Centre international d' expertise

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AFILIAS LIMITED (IRELAND)**

Expert Determination

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1. THE PARTIES

- 1.1 The Objector is European State Lotteries and Toto Association of Avenue de Béthusy 36, 1005 Lausanne, Switzerland.
- 1.2 Parties representatives:
 - 1.2.1 Altius, Mr Kristof Neefs, Havenlaan 86C, PO 414, 1000 Brussels, Belgium; and
 - 1.2.2 Hengler Mueller Parterschaft von Rechtsanwälten, Dr Dirk Uwer, Benrather Straße 18-20, 40213, Düsseldorf, Germany.
- 1.3 The Applicant is Afiliat Limited of 2 La Touche House, IFSC, Dublin, Republic of Ireland.
- 1.4 The Objection relates to the string.LOTTO.
- 1.5 This Expert Determination has been rendered in accordance with the Rules for Expertise of the International Chamber of Commerce (ICC), supplemented by the Practice note on the administration of cases under the Attachment to Module 3 of the gTLD (generic Top Level Domain) Applicant Guidebook, New gTLD Dispute Resolution Procedure (Procedure) of the gTLD Applicant Guidebook.
- 1.6 The Objection is dated 13 March 2013 and was filed with the International Centre for Expertise (Centre) of the ICC pursuant to Module 3 of the gTLD Applicant Guidebook, the Procedure, and the ICC Rules for Expertise (Rules) on 13 March 2013.
- 1.7 The Applicant's Response dated 13 May 2013 was filed with the Centre on 13 May 2013.
- 1.8 The Centre has undertaken an Administrative Review of the Objection and the Response and established that they comply with the Procedure and the Rules.
- 1.9 The Expert Panel, Mr Clive Duncan Thorne of Reynolds Porter Chamberlain LLP, Tower Bridge House, St Katharine's Way, London E1W 1AA, was appointed on 12 June 2013 by the Chairman of the Standing Committee pursuant to Art. 3(3) of Appendix I to the Rules.
- 1.10 The file was transmitted to the Expert Panel by the Centre on 3 July 2013.
- 1.11 The Expert Determination was submitted to the Centre on 20 August 2013 within the extended time limit of one week granted by the Centre on 16 August 2013. In the Expert's view, there are no procedural or interlocutory matters outstanding. The language of the proceedings was English pursuant to Article 5(a) of the Procedure.
- 1.12 All communications between the parties, the Expert Panel and the Centre were submitted electronically pursuant to Article 6(a) of the Procedure and no additional submissions or evidence were submitted. No hearing took place or was requested by the parties.

2. THE OBJECTION

- 2.1 The Objection is made under Module 3 of the gTLD Applicant Guidebook dated 4 July 2013.
- 2.2 The grounds of objection are a Community Objection as defined in section 3.2.1;

"There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted."

2.3 Section 3.2.2 of Module 3 provides that:

"Objectors must satisfy standing requirements" and in the case of a community objection, this is that the Objector is an "established institution associated with a clearly delineated community".

2.4 This is elaborated at section 3.2.2.4 as follows:

"3.2.2.4 Community Objection

Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. To qualify for standing for a community objection, the objector must prove both of the following:

It is an established institution – Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

It has an ongoing relationship with a clearly delineated community - Factors that may be considered in making this determination include, but are not limited to:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

The Panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination (in accordance with Art. 3.5.4 of the Guidebook). It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements."

3. OBLIGATIONS OF THE EXPERT PANEL

3.1 These are set out at Section 3.5 of Module 3. Section 3.5 provides that each Panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified. The Panel may also refer to other relevant rules of international law in connection with the standards.

3.2 It should be noted that the Objector bears the burden of proof in each case and that the principles outlined in Module 3 are expressly subject to evolution based on on-going consultation with DRSPs, legal experts and the public.

3.3 Section 3.5.4 of Module 3 sets out the four tests to enable a DRSP Panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the Objector must prove that:

- "• The community invoked by the objector is 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. Each of these tests is described in further detail below.

Community – The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel is entitled to balance a number of factors to determine this, including but not limited to:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;
- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial); and
- The number of people or entities that make up the community.

If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail.

Substantial Opposition – The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:

- Number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- Level of recognized stature or weight among sources of opposition;
- Distribution or diversity among sources of expressions of opposition, including:
 - Regional
 - Subsectors of community

- Leadership of community
- Membership of community
- Historical defense of the community in other contexts; and
- Costs incurred by the objector in expressing opposition, including other channels the objector may have used to convey opposition.
- If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

Targeting – The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.

Detriment – The objector must prove that 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. An allegation of detriment that consists only of the application being delegated the string instead of the objector will not be sufficient for a finding of material detriment.

Factors that could be used by a panel in making this determination include but are not limited to:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string..."

4. LOCUS STANDI

4.1 Under clause 3.2.2.4 of Module 3, the Objector has to show that it has locus standi to object. This requires it to show that it is an established institution and also that it has an on-going relationship with a clearly delineated community.

(i) Established institution

4.2 The Objector relies upon the following evidence to support its submission that it is an established institution:

4.2.1 that it was created in 1983 under Swiss law;

4.2.2 it is an umbrella organisation of National Lotteries, operating lotteries, lottery games, sport betting and other games of chance for the public benefit;

4.2.3 its members are organisations that only offer lotteries, lotto and betting services in jurisdictions in which they are licensed by the respective national government. They strictly adhere to national laws and high level consumer protection standards. The greater part of members' annual sales volume is dedicated to good causes and/or state finances;

4.2.4 the Objector points out that it has over 70 members based in EU and non EU countries listed in Annexes 6 and 7 to the Objection. As such it maintains that it enjoys global recognition as a key player in the representation of licensed lottery operators.

4.3 The Applicant accepts that the Objector "might be able to prove that it is an established institution", but submits that it does not have an on-going relationship with "a clearly delineated community". Module 3 sets out the factors that may be considered in making the determination as to whether the objector is an established institution including level of global recognition, the length of time the institution has been in existence and public historical evidence of its existence. Having considered the evidence referred to above, the Expert finds that the Objector is an established institution for the purposes of paragraph 3.2.2.4. of Module 3.

(ii) On-going relationship with a clearly delineated community

4.4 In support of its submissions, the Objector relies upon the following:-

4.4.1 The association is governed by a General Assembly composed of all of European Lotteries members. Details of the organisation of the Objector are set out at Annex 8 to the Objection;

4.4.2 Its aims and objectives as set out in Article 2 of its bylaws (Annex 5) to the Objection are "to advance the collective interests of its members and to enhance the capability, common knowledge and status of individual members";

4.4.3 The Objector substantially invests in these objectives by "weighing in" on policy issues at all European institutions (Annex 9 to the Objection) and by providing a forum in which members can exchange information and experience;

4.4.4 The Objector also publishes, three times a year, a magazine on the European lottery industry as exhibited at Annex 10;

4.4.5 The Objector has determined and adopted responsible Gaming Standards to help tackle illegal gambling and related criminal activities;

4.4.6 The Objector is in constant dialogue with organisations that share its goals such as the World Lottery Association. It should be noted from Annex 2 to the Objection that the World Lottery Association has formally endorsed the current Objection;

4.4.7 The Objector's sole reason of existence is to further the interests of the community it represents in the Objection.

4.5 The Applicant submits that several of the members of the Objector are in constant, deliberate and persistent breach of national laws aimed at the protection of minors and endangered players and the prevention of problem gaming. It refers to the German state lotteries associated with Deutsche Lotto-und Totoblock (DLTB) having been sanctioned by the German courts for violating regulations about advertising for games of chance and letting minors participate in games of chance. This demonstrates that some of the

Objector's significant and prominent members do not seem to belong to the community the Objector claims to represent.

- 4.6 The Applicant also submits, in accordance with Article 4.1.1 of the Objector's statutes (Annex 5 to the Objection), that any organisation within the European sphere that conducts games of chance and/or skill is eligible for regular membership. It points out that the Objector also claims to file the Objection in the name of members based in non EU countries such as Israel and Morocco. It also points out that service providers for member lotteries or associate members may become associate members of the Objector but it is not clear whether the Objection was also filed on behalf of associate members.
- 4.7 In summary, the Applicant submits that the Objector does not have a clearly delineated relationship with a particular community.
- 4.8 Factors that the Panel may take into account in deciding this issue are set out in paragraph 3.2.2.4 of Module 3, including the presence of mechanisms for participation in activities, membership and leadership, and institutional purpose relating to the benefit of the associated community, the performance of regular activities that benefit the associated community and the level of formal boundaries around the community. It is not expected that an Objector must demonstrate satisfaction of each and every factor considered.
- 4.9 It is clear from the evidence submitted by the Objector and set out above that it has an institutional purpose relating to the benefit of the associated community and that it performs regular activities that benefit the associated community. It is apparent from the aims and objectives contained in the bylaws (Annex 5 to the Objection) that the Objector has an institutional purpose relating to the European lottery industry. In the Panel's view the existence of a clearly delineated community does not depend on the fact whether or not certain of its members are in breach of national laws. The Panel notes the submission that only European based organisations are eligible for regular membership. In the Panel's view, it is quite apparent that the Objector represents European lottery organisations whether or not it also represents non-European organisations in countries such as Israel and Morocco. The argument that it is not clear whether the Objection was also filed on behalf of Associate Members is, in the Panel's view, misconceived since it is apparent from the Objector's Statutes (Annex 5 to the Objection) that the Objector represents non-associate ie. "Regular Members". That representation is sufficient to fall within the factors set out at paragraph 3.2.2.4 whether or not the Objection is also filed on behalf of Associate Members.
- 4.10 It follows, and the Panel hereby decides, that the Objector is eligible to file a Community Objection within paragraph 3.2.2.4 of Module 3.

5. THE FOUR TESTS TO ESTABLISH A COMMUNITY OBJECTION UNDER ARTICLE 3.5.4 OF MODULE 3

- 5.1 These are as follows:
 - 5.1.1 The community invoked by the Objector is a clearly delineated community; and
 - 5.1.2 Community opposition to the application is substantial; and
 - 5.1.3 There is a strong association between the community invoked; and the applied for gTLD string; and

5.1.4 The application creates a likelihood of material detriment to the rights or legitimate interest of a significant portion of the community to which the string may be explicitly or implicitly targeted.

6. THE COMMUNITY IS CLEARLY DELINEATED

6.1 The Objector must prove that the community expressing opposition can be regarded as a clearly delineated community. The Panel is entitled to balance a number of factors to determine this which include but are not limited to the following:

6.1.1 the level of public recognition of the group as a community at a local and/or global level;

6.1.2 the level of formal boundaries around the community and what persons or entities are considered to form the community;

6.1.3 the length of time the community has been in existence;

6.1.4 the global distribution of the community (this may not apply if the community is territorial); and

6.1.5 the number of people or entities that make up the community.

6.2 The Objector submits that it falls within these factors because:

6.2.1 The community that it directly represents consists of its own members;

6.2.2 It indirectly represents the World Lottery Association.

6.3 The Objection is also filed on behalf of World Lottery Association members.

6.4 The Objector points out that it has members based in EU and non-EU countries (Annexes 6 and 4 to the Objection) and that the membership of the World Lottery Association which supports the Objection is geographically diversified as set out in Annex 13 to the Objection and covers Lottery members in Europe, Africa, Asia, Australia, North and South America.

6.5 In summary, the Objector submits that the members of the community represented by the Objector all have in common the fact that they are lottery operators which only provide their services in jurisdictions where they are licensed by the government to do so. This distinguishes them from unlicensed operators.

6.6 The Applicant points out that:

6.6.1 the number of entities supporting the Objection is insufficient to constitute a clearly delineated community;

6.6.2 the community which the Objector claims to represent cannot be clearly delineated because there is uncertainty whether the community includes non-EU as well as EU operators of games of chance and service providers;

6.6.3 the Objection fails to draw a clear distinction between licensed and unlicensed operators of games of chance. Regular membership requires that the organisation "is licensed to authorise by a jurisdiction (...) who in accordance with prevailing national law may issue a licence or authorisation to operate such games". It relies on the example that some companies may be licensed in one state to provide cross-border gaming services, eg on-line gaming service and thus act with an

authorisation under their domestic laws while they might not have obtained additional authorisations in other states where they offer their services. It argues that the Objector does not mention on-line cross-border gaming services and submits that the Objector only speaks for state-owned or state controlled operators and that almost all of the Objector's members are state owned or controlled.

6.7 Having considered these submissions the Panel finds that there is a community expressing opposition and that this can be regarded as a "clearly delineated community".

6.8 There is no doubt in the Panel's view that the community represented by the Objector consists of its members based in EU and non-EU countries as listed in Annex 6 and Annex 7 to the Objection. There are over 70 members, all of which consist of licensed lottery operators in those countries. They are organisations that only offer lotteries, lotto and betting services in the countries in which they are licensed by their respective national governments. This is the community. The Panel is required to consider whether the community is clearly delineated.

6.9 The Objector's evidence set out in Annex 4 to the Objection shows that the Objector is the "umbrella" organisation of national lotteries operating games of chance for the public benefit. It states:

"European Lotteries brings together state-owned and private operators, both profit and non-profit, who operate on behalf of the state. Our members only offer gambling and betting services in the jurisdictions in which they are licensed by the respective national government. Our association was created in 1983 under Swiss law and is head-quartered in Lausanne, Switzerland. In 1999 we adopted the name The European Lotteries and added the sport betting operators to our membership."

6.10 It is also, in the Panel's view, apparent from Annex 4 that the Objector has an express "mission":-

" to promote a sound and sustainable gaming model for the benefit of society that we stand for and this is based on the values of subsidiarity, precaution, solidarity and integrity. We advance the collective interests of our members, the national lotteries operating games of chance for the public benefit and defend our model in the discussion on the societal, political, economic and regulatory framework for gambling".

6.11 In the Panel's view the membership of the Objector, the commonality of membership and the length of time (30 years) that the community has been in existence as well as the global distribution of the community are sufficient to prove that the community is a clearly delineated community.

6.12 In Response, the Applicant submits that the community cannot be "clearly delineated" because:

6.12.1 there is uncertainty whether the community also includes non-EU operators of games of chance and service providers. In the expert's view this is unsustainable. Annexes 6 and 7 demonstrate that membership can come from both members within and without the EU.

6.12.2 the Objector fails to draw a clear distinction between (represented) licensed and (non-represented) unlicensed operators of games of chance and relies upon Article

4.1.2 of the Objector's Statutes set out at Annex 5 to the Objection. Article 4.1.2 of the Statutes requires that regular members are:

"Licensed or authorised by a jurisdiction domiciled in a State recognised by the United Nations who, in accordance with prevailing national law, may issue a licence or authorisation to operate such games as defined in Article 4.1.1 where the annual sales volume of such games form the greater part of the organisation's total gross revenue and whose net revenues for the greater part are dedicated, by public decision, to good causes and/or the State Exchequer..."

6.12.3 In the Panel's view the Applicant's argument fails since it is clear from Article 4.1.2 of the Statutes that it sets out a further factor for the purposes of defining Regular Members of the Objector. It is sufficient that a Regular Member for the purposes of Article 4.1.2 of the Statutes is licensed or authorised within the terms of Article 4.1.2 of the Statutes. This applies whether or not (according to the Applicant) companies may be licensed in one State to provide cross-border gaming services.

6.13 Further, the Applicant argues that almost all of the Objector's member organisations are State-owned or controlled, even though the public does not necessarily expect a lottery to be operated by the State since there are many private operators active in the gaming market. In the Panel's view for the purpose of considering a delineated community it does not matter whether the Objector represents only State-owned or State-controlled operators. A grouping consisting only of State lotteries might still consist of a clearly delineated community as required by paragraph 3.5.4 of Module 3.

6.14 Accordingly, the Panel finds on the basis of the Objector's proof, that the Objector represents a clearly delineated community.

7. SUBSTANTIAL COMMUNITY OPPOSITION

7.1 Pursuant to paragraph 3.5.4 the Objector must prove substantial opposition within the community that it has identified itself as representing. In order to determine whether there is substantial opposition the expert is entitled to balance a number of factors, including but not limited to:

7.1.1 Number of expressions of opposition relative to the composition of the community;

7.1.2 The representative nature of entities expressing opposition;

7.1.3 The level of recognised stature or weight among sources of opposition;

7.1.4 Distribution or diversity amongst sources of expressions of opposition, including:

- Regional;
- Sub-sectors of community;
- Leadership of community;
- Membership of community;

7.1.5 Historical defense of the community in other contexts; and

7.1.6 Costs incurred by Objector in expressing opposition, including other channels the objector may have used to convey opposition.

- 7.1.7 If some opposition is determined, but it does not meet the standard of substantial opposition, the objection will fail.
- 7.2 The Objector submits that the Objection satisfies this test for the following reasons:
- 7.2.1 More than a significant part of a community of licensed lottery operators clearly opposes the TLD;
- 7.2.2 The Objector, the World Lottery Association and their members are strongly opposed to the delegation of .LOTTO. The Objector and the World Lottery Association are both household names in the community represented in the Objection;
- 7.2.3 The fact that two of the community's largest umbrella organisations express such opposition and which is intrinsically linked to their members' activities should carry "much weight" in determining substantial opposition;
- 7.2.4 A survey among the Objector's members leads to many individual expressions of opposition to the application. The results of the survey are set out in Annex 14 to the Objection.
- 7.3 Against that the Applicant submits:
- 7.3.1 The Objector does not represent a substantial part of the community it has identified itself as representing. It only speaks for a minority of participants;
- 7.3.2 Within the European gaming market the Objector only represents operators of games of chance which have an exclusive licence from the State to operate games and are State-controlled, ie. monopolists;
- 7.3.3 The monopolists represented by the Objector only generate a minor share of gross gaming revenues in Europe and are not representative of private operators of games of chance at which the applied for gTLD string is targeted;
- 7.3.4 Large gaming markets outside Europe including the USA and Asia Pacific are not represented by the Objector;
- 7.3.5 Only 46 members out of 70 members of the Objector support the Objection.
- 7.4 The Applicant submits that the Objector only speaks for a minority of participants in the on-line gaming market. It refers to other organisations such as the German Private Lottery Association (DLV), European Gaming and Betting Association (EGBA), the Remote Gambling Association (RGA) and the Interactive Gaming Council (IGC) as representing a large number of games of chance within the EU and worldwide.
- 7.5 The Applicant also stresses that the Objector only represents operators of games of chance having an exclusive State monopoly. These monopolies only generate a minor share of European gross gaming revenues; other large gaming markets in the USA or Asia are not represented by the Objector.
- 7.6 The Applicant points out that only 46 out of 70 members of the Objector support the Objection and that the remaining 24 members cannot be regarded as a substantial part of the community.
- 7.7 The Applicant may be right in the factual basis for its submissions. However in the Panel's view this does not detract from the fact that the Objector still represents a substantial

community opposition. As set out at paragraph 6 of the Objection, the Objection is filed on behalf of the community directly represented by European Lotteries ie. its members and also indirectly on behalf of the World Lottery Association on whose behalf the Objection is also filed. Annex 2 to the Objection is a copy of Letter of Endorsement signed on behalf of the World Lottery Association confirming that the World Lottery Association fully endorses the actions taken by the Objector and *"for the same reasons as those put forward by European Lotteries, shares the view that .LOTTO should not be registered as a generic top level domain (gTLD)."*

7.8 The Panel also notes from Annex 13 to the Objection that the World Lottery Association membership consists of Member Lotteries throughout the world.

7.9 The Panel has considered the conflicting views of the parties in balancing the required factors with paragraph 3.5.4 of Module 3. In the Panel's view the fact that the Objector which represents a significant group of Members within the lottery industry both from the EU and from non-EU countries (Annexes 6 and 7 to the Objection) as well as the World Lottery Association which are opposed to the delegation of .LOTTO means that the Objector has satisfied factors (i), (ii), (iii) and (iv). As the Objector puts it in its Objection;

"The mere fact that two of the community's largest umbrella organisations express opposition to the delegation of a TLD that is intrinsically linked to their members' activities should carry much weight in determining substantial opposition in accordance with the Guidebook."

7.10 The Objector also refers to the fact that opposition from a single entity can itself be substantial in a given case and refers to the Applicant Guidebook v4 Comment Analysis.

7.11 In the Panel's view and having considered the evidence and balanced the required factors, it follows that the Objector has succeeded in proving the existence of Substantial community Opposition.

8. STRONG ASSOCIATION BETWEEN THE COMMUNITY INVOKED AND THE STRING

8.1 The Objector must prove a strong association between the applied for gTLD string and the community represented by the Objector. Paragraph 3.5.4 of Module 3 sets out the factors that should be balanced by a Panel to determine this include but are not limited to:

- statements contained in application
- other public statements by the applicant
- associations by the public.

8.2 If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the Objection will fail.

8.3 In support of its Objection the Objector submits as follows:

8.3.1 It cannot be contested that the TLD applied for is strongly associated with the community *"in the sense of Article 3.45 of the Guidebook"*;

8.3.2 First and foremost the term *"LOTTO"* (and its alternative spelling *"LOTO"*) is associated in the mind of the general public with lotteries;

- 8.3.3 The Statement of Purpose under Section 18(a) of the application (Annex 3 to the Objection) leaves little doubt as to the requirement of association;
 - 8.3.4 Several members of the Objector organise a national lottery using the term "LOTO" or "LOTTO";
 - 8.3.5 There is therefore a clear nexus between the string .LOTTO and state-licensed lotteries ie. the community represented in the Objection.
- 8.4 To the contrary the Applicant submits:
- 8.4.1 The Applicant does not only target monopolies of operators of games of chance as are represented by the Objector but any operators or retailers of games of chance independently of whether they are privately owned or owned or controlled by the State, as well as any companies or institutions whose field of activity is connected with the offering of games of chance;
 - 8.4.2 The Objector refers to "government operated lotteries" as targeted organisations (page 7 of the Objection). The Applicant has included reference to government operated lotteries in order to demonstrate the potential target audience and demand for the applied for the gTLD. This does not mean that the .LOTTO string shall be open only to State owned or operated lotteries;
 - 8.4.3 The term "LOTTO" or "LOTO" is associated in the public mind with lotteries but they are not restricted to State owned or controlled lottery operators;
 - 8.4.4 The public also associates the term "LOTTO" or "LOTO" with products, brand names and trademarks of private operators and does not necessarily expect that gaming services branded in this way are offered by State owned or State controlled organisations. By claiming the term "LOTTO" or "LOTO" exclusively for State owned or controlled lottery operators the Objector neglects the market reality in the worldwide market of games of chance which has a vast number of private operators and service providers;
 - 8.4.5 The .LOTTO string is not identical to the name of the community members or most of their products as will be necessary for the public to make a strong association between the string and the community. Many members of the Objector do not even have the term "LOTTO" or "LOTO" in their name. Overall the Objector has failed to prove that the term "LOTTO" or "LOTO" will exclusively or predominantly be linked by the public to stated owned or controlled operators of games of chance as represented by the Objector. There is therefore no strong association between the community represented and the applied for gTLD string.
- 8.5 In determining this element the Panel has considered as is required by paragraph 3.5.4 the following:
- 8.5.1 Statements contained in the application;
 - 8.5.2 Other public statements by the Applicant;
 - 8.5.3 Associations by the public.

(i) Statements contained in the application

8.6 The Applicant specifically refers to Section 18 of the gTLD application (Annex 3 to the Objection) and points out that the gTLD is targeted at any *"entertainment businesses that provide games and lotteries"* and individuals to *"support"* the needs of lottery stakeholders.

8.7 The opening paragraph of Section 18(a) states as follows:

"The mission of the .LOTTO TLD is to offer entertainment businesses that provide games and lotteries to their customers a namespace to establish meaningful and relevant identities to promote their services and offerings. The primary purpose is to foster a sense of professionalism and trust among customers, other businesses and organisations that are part of the lottery industry..."

8.8 Section 18(a) goes on to set out a variety of reasons why businesses and individuals would want to acquire the gTLD under the application.

8.9 The Objector submits that the mission statement under Section 18(a) *"leaves little doubt as to the requirement of association. It clearly lists government operated lotteries as the primary target audience for the TLD."* The Applicant points out that although the Objector refers to *"government operated lotteries"* in the application as targeted organisations the Applicant has included such reference in order to demonstrate the potential target audience and demand for the applied for gTLD. That does not mean that the .LOTTO string shall only be open to State owned or operated lotteries. It points out that while it may be true that the terms *"LOTTO"* or *"LOTO"* are associated in the public mind with lotteries such association is not restricted to State owned or controlled lottery operators (as represented by the Objector) but also includes private operators, private brokers and other retailers of games of chance. It refers to a decision of the German Federal Court of Justice (BGH) which has ruled that the term *"LOTTO"* is not necessarily linked to the games of chance operated by the German association of state monopoly lottery companies (DLTB).

(ii) Other public statements by the applicant

8.10 There is no reliance by either party on other public statements outside the Application.

(iii) Associations by the public

8.11 The Objector submits that the term *"LOTTO or LOTO"* is associated in the mind of the general public with lotteries and that this is true in English, French, German and Spanish. It sets out in Annex 15 to the Objection evidence of lotteries throughout the world and in particular under the heading *"Early History"* shows the history of lotteries and the fact that they have been used to help finance major government products since the Chinese Han Dynasty. It points out that several members of the Objector organise a national lottery using the term *"LOTTO"* or *"LOTO"* including Austria, Belgium, Denmark, Estonia, Finland, France, Ireland, The Netherlands, Norway, Poland, Russia, Slovak Republic, Switzerland and Turkey. (See Annex 16 to the Objection). It also points out that many of the European lotteries own both National or Community Trademarks comprising the term. These are set out at Annex 17 to the Objection. It is argued by the Objector that this further confirms that the relevant public in these jurisdictions will associate the string (and domain names registered under the TLD) to State licensed lotteries.

8.12 The Applicant refers to the registration of the term *"LOTTO"* or *"LOTO"* with the products, brand names or trademarks of private operators, brokers or other retailers of games of chance using these terms. It submits that the public does not necessarily expect that gaming services branded with names using the term *"LOTTO"* or *"LOTO"* to be offered by

State owned or State controlled organisations and that by claiming that the term "LOTTO" or "LOTO" exclusively for State owned or controlled lottery operators, the Objector neglects the market reality in the worldwide market for games of chance and the vast number of private operators and service providers.

- 8.13 It also submits that the .LOTTO string is not identical to the name of the community members or most of their products as is necessary for the public to make a strong association between the string and the community. Many members of the Objector do not have the term or "LOTTO" or "LOTO" in their name eg La Francaise des Jeux in France or Svenska Spel AB in Sweden. They offer examples of lotteries whose brand name does not include the term "LOTTO" or "LOTO" such as the European worldwide lotteries "EuroJackpot" and "Euromillions" or on a national basis, for example, the German lotteries "GlucksSpiral", "Spiel 77" and "Super 6" or the French lottery "Rapido", or the Spanish lottery "el Gordo".
- 8.14 Having considered these factors and the evidence adduced by the parties the Panel takes the view that the Objector has proved a strong association and that the term "LOTTO" or "LOTO" will be linked by the public to the operators of games of chance as represented by the Objector, ie. state-licensed operators and that there is therefore a strong association between the community market and the applied-for gTLD string.

9. DETRIMENT

- 9.1 The Objector must prove that 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. An allegation of detriment that consists only of the Applicant being delegated the string instead of the Objector will not be sufficient for a finding of material detriment.
- 9.2 Factors as provided by paragraph 3.5.4 of Module 3 that could be used by a panel in making this determination include but are not limited to:
- 9.2.1 Covering nature and extent of damage to the reputation of the community represented by the Objector that would result from the Applicant's operation of the applied-for gTLD string;
 - 9.2.2 Evidence that the Applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the Applicant has not proposed or does not intend to institute effective security protection for user interests;
 - 9.2.3 Interference with the core activities of the community that would result from the Applicant's operation of the applied-for gTLD string;
 - 9.2.4 Dependence of the community represented by the objector on the DNS for its core activities;
 - 9.2.5 Nature and extent of concrete or economic damage to community represented by the objector that would result from the Applicant's operation of the applied-for gTLD string; and
 - 9.2.6 Level of certainty that alleged detrimental outcomes would occur.

- 9.3 If opposition by a community is determined but there is no likelihood of material detriment to the targeted community resulting from the Applicant's operation of the applied-for gTLD, the objection will fail.
- 9.4 The Objector takes the view that 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 is *"likely to occur if .LOTTO is delegated"*. It submits as follows:
- 9.4.1 The Applicant who has no known affiliations to State operated lotteries seeks to operate an open .LOTTO top level domain. This would mean that both State licensed lottery operators as well as unlicensed businesses would be able to register domain names in .LOTTO. This entails a substantial risk that illegal ie. unlicensed online gambling offerings will also be operated under the domain.
- 9.4.2 Unlicensed offerings will enjoy association with the term "Lotto" which is associated with the positive qualities of legitimate licensed lottery offerings. Internet users would be led to believe that websites offered under the domain originate from licensed operators.
- 9.4.3 Use of the gTLD would infringe the trademark rights of the European lotteries members.
- 9.4.4 The operation of .LOTTO as an open gTLD would lead to consumer confusion and a negative impact on legitimate lottery businesses and on the values they stand for.
- (i) **Nature and extent of damage to the reputation of the community represented by the objector**
- 9.5 The Objector's submission is summarised in that unlicensed operators would;
- "illegitimately ride on the coat tails of the carefully developed reputation of State lotteries, the general availability of .LOTTO domain names would confer upon illegal operators the advantage of associating their website with State licensed lotteries which would damage the interests of unsuspecting consumers which would be detrimental to both licensed operators and internet users"*.
- 9.6 The Applicant submits that the Objector has failed to prove that the delegation of the .LOTTO string would cause significant damage to the reputation of the community represented by the Objector. Insofar as the Objector worries about potential competition to the community members by unlicensed or criminal operators it points out that such risk exists with any gTLD and that this by itself cannot render an objection against the delegation of the gTLD successful. It points out, as is acknowledged by the Objector, that the mere rejection of the delegation of the .LOTTO string will not avoid or reduce unlicensed offers or offers with a criminal background with the gambling market. The prevention of such activity is a regulatory matter and should not be the subject of an objection process against the delegation of a gTLD. Moreover, the decision whether restrictions of internet gambling are necessary and justified are subject to national or EU law and Court decisions.
- 9.7 In summary, the Applicant's case is:
- "It is not up to the Objector or its members to decide about the restrictions adequate to regulate online gambling services and to enforce them via an objection process against the delegation of a gTLD. Thus, the Objector's*

explanations of alleged justification for a monopoly system for games of chance are of no relevance for the objection process at hand."

- 9.8 The Applicant also argues that although the Objector criticises the registry policies of the Applicant it is clearly up to the Applicant (not to a minority of market participants) to decide about registry policies for an applied-for gTLD. It is in the nature of a gTLD that such a TLD is generally open to all registrants although in practice most target a certain group of registrants distinguished eg by country, interest or business activities.
- 9.9 In summary, there are no indications of damage to the reputation of the community invoked by the delegation of the applied-for gTLD.
- 9.10 Having considered both parties' submissions the Panel is convinced by the Applicant's case and finds that the Objector has failed to establish damage to the reputation of the community represented by the Objector resulting from the Applicant's operation of the applied-for gTLD string.

(ii) Evidence that the Applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely

- 9.11 In summary, the Objector's case is that the Applicant provides "no safeguards whatsoever" that the TLD will only be used by licensed operators so that the user confidence referred to would be justified. It points out that the Applicant proposes to operate .LOTTO as an open TLD that is "generally available to all registrants". (Section 18(b)(iv) of the application annexed as Annex 3 to the Objection.)
- 9.12 The Objector points out that European Lotteries members are well managed businesses whose revenues contribute to society. They adhere to strict standards of responsible gaming, thereby minimising potential harm on society and in particular vulnerable groups. In support of this the Objector refers to a number of decisions of the CJEU, Liga Portuguesa (C-42/07) (Annex 20 to the Objection) and Betfair C-203/08 (Annex 21 to the Objection) which support the view that there is an increased risk of overspending, fraud and addiction by consumers. A report of the European Parliament referred to by the Objector (Report of 14 October 2011 on online gambling in the internal market 2011/2084/INI – Annex 23 to the Objection) acknowledges that:

"Online gambling, if not properly regulated may involve a greater risk of addiction than traditional physical, location based gambling, owing inter alia to increased ease of access and the absence of social control" and that "consumers must be educated about the potential harm of online gambling and protected against dangers in this area, especially addiction, fraud, scams and underage gambling".

- 9.13 The Objector argues that against this backdrop it is clear that "regulatory restrictions on internet gambling are justified". It follows that undertakings having been granted and received a State licence to operate a lottery provides legal and business safeguards for responsible gaming and that in the jurisdictions in which European Lotteries' members operate the term "Lotto" and/or "loto" it is directly associated to these positive qualities, standards and safeguards. To the contrary websites operated under the .LOTTO TLD as an open TLD by the Applicant would be subject to the risk that unlicensed and even fraudulent businesses would use the .LOTTO extension to associate unsuspecting internet users and their businesses with the legal safeguards provided by government operated or government licensed lotteries. Unlicensed operators would therefore illegitimately ride on the coat tails of the carefully developed reputation of State lotteries.

- 9.14 In contrast, the Applicant proposes extensive state of the art security measures to prevent illegal, malicious or fraudulent use of the applied-for gTLD. It refers to the anti-abuse policy set out at section 28 of the Application (Annex 3 to the Objection). Moreover it submits that the proposed registry policies further ensure a well regulated registration process to prevent unqualified or incomplete registrations and to protect the rights of third parties.
- 9.15 In summary, the Applicant submits that in view of its long-standing experience in the operation of large gTLD's such as .info (directly as registry operator) and .org (under contract with public interest registry) there can be no doubt that the Applicant can guarantee a high standard of protection for domain users and consumers and acts in the best interests of the community in which the string is targeted. It submits that the Objector has not provided any evidence that the registry policies of the Applicant are insufficient to prevent malicious use of the applied-for gTLD.
- 9.16 The Applicant argues the exclusive access of State owned or State controlled operators of games of chance that the .LOTTO string would not by itself guarantee a high standard of consumer protection for gambling services.
- 9.17 Having considered the parties' submissions the Panel comes to the view that although as pointed out by the Objector there are risks of increased illegal or fraudulent activity these would not necessarily be prevented by the mere fact that the members of the Objector are State owned or State controlled operators. The problems raised might well be prevented by the anti-abuse policy of the Applicant. In particular the Panel takes into account the Applicant's submission and finds that the Objector has not provided any evidence that the registry policies of the Applicant are insufficient to prevent malicious use of the applied-for gTLD.
- 9.18 It follows that the Objector has failed to prove that the Applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely. To the contrary, there is evidence that the Applicant has proposed instituting effective security protection for user interests.

(iii) Interference with the core activities of the community

- 9.19 The Objector submits that the general availability of .LOTTO domain names would confer upon illegal operators the advantage in the eye of unsuspecting consumers of associating their websites with State licensed lotteries which would be detrimental to both licensed operators and internet users.
- 9.20 The Applicant denies that the delegation of the applied-for gTLD to the Applicant would interfere with the core activities of the community invoked by the Objector. Such interference could not be claimed merely because community members use the internet for communication, marketing and distribution of their products and services. Any community could stop the delegation of a gTLD by simply identifying online communication as a core activity. Leaving the requirement to demonstrate a material detriment to the community is largely meaningless. Online communication is not a core activity of State owned or controlled operators of games of chance; most members of the Objector have a long tradition of offering games of chance outside the internet as they have been established long before the appearance of online business models.
- 9.21 In the Panel's view there is no evidence before it that the delegation of the applied-for gTLD to the Applicant would justifiably interfere with core activities of the community as referred to by the Objector. Accordingly the Objector has failed to prove such interference.

(iv) Dependence of the community represented by the Objector of the DNS for its core activities

9.22 The Objector does not specifically address this issue.

9.23 The Applicant submits that the community invoked by the Objector ie. the State licensed operators does not depend on the .LOTTO string for its core activities. The Objector has failed to prove that the community members need online communication in order to conduct their business model. It points out that most State owned or controlled lotteries have a long tradition of offering games via phone or mail or international sales agencies insofar as they offer their products and services online they have established websites registered under different TLD's. There is no evidence that consumers wanting to participate in their games of chance had difficulty finding their websites in order to do so.

9.24 There is no evidence to the contrary adduced by the Objector and the Panel finds that the Objector has not succeeded in proving such dependence.

(v) Nature and extent of concrete or economic damage to the community represented by the Objector

9.25 The Objector's case is that there is a significant risk that unlicensed and fraudulent businesses will use the .LOTTO extension to associate in the eye of unsuspecting internet users, their business to the legal safeguards provided by government operated or government licensed lotteries. Delegation of .LOTTO as an open TLD would cause harm to the community and more importantly to internet users.

9.26 The Objector submits that the mere rejection of the applied-for gTLD will not exclude any unlicensed or illegal activities operators of games of chance.

9.27 Contrary to the Objector's fear that competitors of the represented community members could make use of their market reputation by using the .LOTTO string the Applicant points out that community members have many possibilities to distinguish themselves from other operators by means of competition and promotion. The Applicant submits that the Objector has not provided any evidence that the use of the gTLD can lead to a consumer confusing different operators. This is because the public does not necessarily associate State owned or controlled organisations with the term "Lotto" or "Loto".

9.28 In paragraph 12 to the Objection that use of .LOTTO domain names will amount to infringements of the Objector's members' trademark rights. The Applicant submits that this is a matter for a Legal Rights Objection. This is the jurisdiction of the World Intellectual Property Organisation Arbitration and Mediation Center (see article 3.2.2.2 of the Guidebook). The alleged infringement of trademark rights is of no relevance to the case at hand.

9.29 The Panel is prepared to accept that there may be a risk of trademark infringement but in the absence of any specific evidence from the Objector it is not in a position to consider this further. The Panel regards trademark infringement as a factor which might establish "*concrete or economic damage to the community represented by the Objector*". However in the absence of specific evidence from the Objector the Panel is unable to make any conclusion in that regard.

9.30 The Applicant also points out that its registry policies effectively prevent infringements of existing trademarks through registration under the applied-for gTLD. The registry policies provide for a so-called "sunrise period" granting trademark holders a possibility of early

registration before opening registration to the public (see section 18(b)(iv) of the registry policies at Annex 3 to the Objection).

9.31 The Panel finds that the Objector has failed to demonstrate concrete or economic damage to the community represented by the Objector as a result of the Applicant's operation of the applied-for gTLD string.

(vi) Level of certainty for alleged detriment

9.32 The Objector submits that there is a "*significant risk*" that unlicensed and even fraudulent businesses will use the .LOTTO extension to associate in the eye of unsuspecting internet users, their business with the legal safeguards provided by government operated or government licensed lotteries. Delegation of .LOTTO as an open TLD would cause harm to the community and, more importantly, to internet users.

9.33 To the contrary, the Applicant submits that the Objector has failed to prove a sufficient level or degree of certainty for the alleged detriment. It points out that the appearance of unlicensed or criminal business models within the market for games of chance can never be excluded but there is no evidence that community members will suffer harm simply because of the possibility that such operators may register under the same gTLD.

9.34 The Applicant also submits that it is very likely that at present unlicensed operators or even operators using fraudulent business models have registered under the same gTLD as community members as there are already unlicensed and illegal offers of games of chance present and visible on the internet. There is no indication the reputation of the community members will suffer any harm simply because there is a chance that they register under the same gTLD.

9.35 The Objector submits that there is a significant risk. It does not however produce evidence to support that submission.

9.36 It follows that the Objector has failed to prove a sufficient level of certainty for the alleged detriment.

10. CONCLUSION

10.1 The Panel finds:

10.1.1 The Objector has proved that the community invoked by the Objector is a clearly delineated community

10.1.2 The Objector has proved that community opposition to the Application is substantial

10.1.3 The Objector has proved that there is a strong association between the community involved and the applied-for gTLD string;

10.1.4 The Objector has failed to prove that 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.

10.2 Accordingly the Panel finds for the Applicant and the Objection is rejected.

11. DECISION


11.1 For the above reasons and according to Art. 21(d) of the Procedure, I hereby render the following Expert Determination:

11.1.1 European State Lotteries and Toto Association's Objection is dismissed;

11.1.2 Applicant AFILIAS LIMITED prevails;

11.1.3 AFILIAS LIMITED's advance payment of costs shall be refunded by the Centre to AFILIAS LIMITED.

Dated: 9/12/2013

Signed: 

Clive Duncan Thorne
Expert