

NEELIE KROES

VICE-PRESIDENT OF THE EUROPEAN COMMISSION

Brussels, -7 11. 2013
Ares(2013) 3432935

Dear Board Members,

The New gTLD Programme Committee of ICANN decided on 28 October that it wanted to hear the different views of GAC members on the issue of the two new gTLDs .wine and .vin. I would ask you that no decisions are made until an agreement is reached between applicants and right-holders and a solution is commonly presented to ICANN by both parties as an example of good cooperation.

This letter aims at providing some clarifications concerning the need for additional safeguards for these strings and suggests possible solutions. It also highlights procedural problems concerning the functioning of ICANN's Governmental Advisory Committee (GAC).

First of all, it is worth recalling what is at stake with the new gTLDs .wine and .vin. Wine is an important market, accounting globally for more than \$270 billion in sales, of which on-line sales represent a significant and growing proportion. The EU has a large market share (around 75% globally) and has an established system of Geographical Indications (GIs) that guarantees the nature and quality of the wine products. This system is enshrined in EU and international law. Geographical Indications are considered Intellectual Property Rights on equal footing with trademarks. GIs also tie in deep historical and cultural traditions.

There are major worries with a delegation without adequate additional safeguards. It is not clear if applicants not involved in the wine sector, not aware of the sensitivities and regulation in place and which did not include any reference to the concept of GIs in their application, can secure the legitimate trade of any product in the wine sector, let alone of those wines protected by GI's legislation worldwide. Even then, the global wine market is very fragmented and behind GIs there is a myriad of small and medium producers - mostly rural - which play a crucial role for the sustainability of their communities and regions and could be negatively affected. Already presently, in the EU, there are many cases of GI name misuse. Cybersquatting is already more than common. The global scope of the gTLD and a lack of clear rules and safeguards can only amplify these problems.

Mr Fadi Chehadé, President and CEO

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Mr Cherine Chalaby, New gTLD Programme Committee

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Consumers risk accessing websites with a GI name which sell wines that have no link with the real origin of the product, with no guarantee on the quality and origin. Even worse, sale of counterfeited products -something relatively easy for wines- may be facilitated. Small rural wine producers may not become aware of cybersquatters abusing their GI names. Without an adequate dispute resolution procedure, the legal burden placed on title-holders of potentially misused GI names is disproportionate. General safeguards rely on ex-post mechanisms and are not fit for GI's purposes. The new gTLDs without proper safeguard could generate serious prejudice that cannot be remedied ex-post, as the victims of the prejudice may have disappeared e.g. as a consequence of lost revenue or damaged reputation.

This being said, I still believe that agreeable solutions can be found among interested parties so that the strings can be delegated in a safe manner for both GI right holders and consumers. We have good examples in other negotiated solutions on equally sensitive strings for the EU like .bio. European wine Governing Bodies and private sector (EFOW, CNAOC, oriGIn or CIVIC among others) with the support of the European Commission, have tried to reach an agreement with the applicants by means of several letters which received elusive responses dependant "of the outcome of the discussions in the GAC". The willingness amongst the three applicants to negotiate has now improved and we hope to see a true engagement to conclude on the matter as soon as possible. Other parties like the Long Island Wine Council and the Napa Valley Vintners are also demanding adequate protection for GI right holders. A solution is within reach and could be commonly presented to ICANN by both parties as an example of good cooperation.

That solution should be based on a specific Geographical Indications Dispute Resolution Policy. WIPO could be consulted on the feasibility and features of such DRP. General safeguards 2 and 5, already accepted by the Board and which refer to "trademarks" should also include a mention to "Geographical Indications" so that the specific nature of GIs is taken into account. Since "applicable law" is a very vague concept and does not specify which law prevails – consumer law, criminal law, IPR law- we consider that only a clear mention to GIs can provide the necessary level of protection. This is the solution proposed by Chile and endorsed by other Latin American countries with a stake in the wine sector.

Besides, organisations of wine GI producers and Governing Bodies should have prior rights such as sunrise periods, means to flag or express opposition to the reservation of second level domain names that are GIs, or any other possibility to oversee the registration by random third parties, as preventive mechanisms.

Registries should be required to explicitly inform of applicable GI legislation in their registration policies and terms of use, and GIs right-holders should be granted sufficient representation in the registries' policy drafting committees and cooperate with them in the implementation of such registration policies.

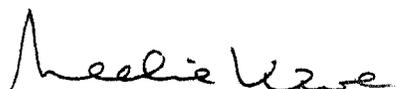
Finally, let me also make a few remarks on procedure. A very large number of GAC members favour introducing specific safeguards. This includes not only the Commission and EU Member States but also Mexico, Argentina, Peru and Chile. This request, from countries representing the greater part of global wine production, is based on legitimate concerns which could have important legal, economic and political implications. By contrast, three GAC members (US, Australia, New Zealand), possibly because they have obtained safeguards for trademarks that are used by wine producers in these countries (rather than GIs) oppose it. The Beijing consensus advice was that further consideration was needed regarding the .wine and .vin strings and that the Board should be advised not to proceed beyond initial evaluation. There is no reason why this advice should be overruled, especially if some solution can be found between the parties.

If the GAC is unable to find consensus on the basis of the above mentioned solutions, it is not acceptable that the default recommendation should be that the GAC recommends delegation of the strings, which would mean siding with the position of those three members. This would de-facto create an unacceptable bias in the GAC advice either in favour of some members or in favour of delegation as such, despite clear objections. The only possible default in case of no GAC consensus should be no advice. This is why the current discussion around .wine and .vin also raises questions concerning decision-making procedures in the GAC, preparation of meetings by the secretariat, the role of the chair and the possibility and conditions for GAC members to vote.

In short, the European Commission and its Member States are of the view that the proposals stated above can be considered by ICANN so that the delegation of the .wine and .vin strings is done in a safe manner to the benefit of all parties, and without challenging EU's legal order and that of other countries in which GI's are considered an important Intellectual Property Right. If there was no possible solution among interested parties because of the complexity of the matter, our position remains that the strings should not be delegated.

I trust that the multi stakeholder approach governing ICANN will be conducive to finding an agreeable solution to this issue. I would like to ask you to engage interested parties -applicants, governments, private sector, wine Governing Bodies, IP experts and other ICANN constituencies- in this discussion before and during the Buenos Aires meeting.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Neelie Kroes". The signature is fluid and cursive, with a prominent initial 'N'.