



Mr Cherine Chalaby, Chair of the New gTLD Program Committee
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536
USA

6 September 2013

Re: GAC Advice related to the .KINDER new gTLD application

Dear Mr Chalaby,

We write on behalf of our client Ferrero Trading Lux S.A. (Ferrero), applicant for three new gTLDs (.FERRERO, .ROCHER, and .KINDER).

The present correspondence concerns Application ID 1-1126-16883 for “.KINDER” which you will undoubtedly recognize as corresponding to Ferrero’s globally-recognized registered trademarks for chocolates and confectionary products.

As you may be aware, the .KINDER application was included in the Governmental Advisory Committee’s (GAC) Beijing Communiqué under its “Category 1 Advice” whereby the GAC proposed that certain safeguards should be implemented for strings which “are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm”.

As you may also be aware, Ferrero submitted an official response to ICANN regarding the GAC’s Beijing Communiqué and in particular its “Category 1 Advice”, within the 21-day timeframe provided for in the ICANN Applicant Guidebook; that response is attached for your background information.

By way of a brief recap, Ferrero’s application for .KINDER is for a single entity-single user “.brand” application corresponding to Ferrero’s famous KINDER confectionary brand (see www.kinder.com); thus providing an objective basis on which to distinguish it from other strings in the Category 1 list.¹

Domain names in the .KINDER registry will only be used by Ferrero and its affiliates (which intent is enshrined in the application and Registry Policies) to further Ferrero’s pre-TLD business; it is fundamentally different from other generic (non-.brand) strings identified by the GAC in Category 1.²

¹ See www.icann.org/en/groups/board/documents/resolutions-new-gtld-02jul13-en.htm#1.c at “Categories of Strings”.

² It seems that the .KINDER application has been placed on the GAC’s Category 1 Advice safeguard list due to the fact that “kinder” is the German word for “children”. We note that with the exception of “.TRAVELERSINSURANCE” (which that applicant has raised for ICANN’s attention), we are not aware of any other .brands which appear on the GAC’s Category 1 Advice safeguard list. We would also like to draw your attention to a letter sent to ICANN by the European NGO Alliance for Child Safety Online (eNACSO, see www.icann.org/en/news/correspondence/de-paoli-to-chehade-17jul13-en), whose work is based on the 1989 UN Convention on the Rights of the Child (UNCRC) in which they identify eight new gTLDs that “specifically target children and young people” and which are of interest. Note in particular that the .KINDER application is not identified.

In light of the above facts and circumstances, while Ferrero is generally supportive of the concept of safeguards aimed at consumer protection – and indeed will operate its TLD in such fashion (e.g., as is substantially illustrated in the attached Appendix), it is clear that the .KINDER application is misplaced within the GAC’s Category 1 Advice safeguard list.

We would be grateful for the New gTLD Program Committee (NGPC) of the ICANN Board to recognize this situation, and to clarify, in conjunction with the GAC if necessary, that the GAC’s Advice issued in this respect is unjustified (whether in error, or otherwise).

We would equally appreciate if you were able to draw our attention to any additional information we might provide that would assist ICANN in coming to a resolution. For example, as stated in Ferrero’s response to the GAC Advice, we would be happy to provide further clarifications, declarations, and/or reassurances deemed useful or necessary.

We are also aware that the New gTLD Applicant Group (NTAG) recently wrote to ICANN concerning the current “freeze” on applications listed in the GAC’s Category 1 Advice safeguard list.³ Without taking a position on that NTAG letter, we feel the concerns raised about fundamental fairness to applicants is even more acute for an applicant such as Ferrero, and that the .KINDER application should proceed in the normal course of application processing, without further delay. Clarification by the NGPC that this is the appropriate way forward would go a long way to fostering consistent, non-arbitrary application of ICANN and GAC policies in the public interest.

Thank you kindly for your time and consideration.

We remain available to answer any questions.

Yours sincerely,

/s/

Ashley Roberts
Client Project Manager
Valideus

cc: Luca Barbero (Ferrero Counsel)
Brian Beckham, Head of Legal Policy, Valideus
Cyrus Namazi, Vice President, DNS Industry Engagement
Sally Costeron, Senior Advisor to the President — Global Stakeholder Engagement
Jeannie Ellers, GAC Coordination

³ See www.icann.org/en/news/correspondence/ntag-to-chalaby-12aug13-en.

Appendix – Excerpts from the .KINDER New gTLD Application

18. b) “.Kinder domains may not be used in a way which knowingly infringes any third party intellectual property rights or gives rise to moral or public order questions.”

28. “One of those public interest functions for a responsible domain name registry includes working towards the eradication of abusive domain name registrations, including, but not limited to, those resulting from:

- Illegal or fraudulent actions
- Spam
- Phishing
- Pharming
- Distribution of malware
- Fast flux hosting
- Botnets
- Distribution of child pornography
- Online sale or distribution of illegal pharmaceuticals.”

“Ferrero will establish and publish on its website a single abuse point of contact responsible for addressing inquiries from law enforcement and the public related to malicious and abusive conduct. Ferrero will also provide such information to ICANN prior to the delegation of any domain names in the TLD. This information shall consist of, at a minimum, a valid e-mail address dedicated solely to the handling of malicious conduct complaints, and a telephone number and mailing address for the primary contact. We will ensure that this information is kept accurate and up to date and will be provided to ICANN if and when changes are made. In addition, with respect to inquiries from ICANN-Accredited registrars, our registry services provider, Neustar, shall have an additional point of contact, as it does today, handling requests by registrars related to abusive domain name practices.”

“...the policy will be incorporated into the applicable Registry-Registrar Agreement and reserve the right for the registry to take the appropriate actions based on the type of abuse.”

“...the Registry reserves the right to deny, cancel or transfer any registration or transaction, or place any domain name(s) on registry lock, hold or similar status, that it deems necessary, in its discretion ...to comply with any applicable laws, government rules or requirements, requests of law enforcement, or any dispute resolution process...”