

EUROPEAN COMMISSION
Directorate-General for Communications Networks, Content and Technology

Cooperation
The Director

Note to the ICANN Board Concerning Resolution 2014.03.22.NG01

Concerning Resolution 2014.03.22.NG01

Resolved (2014.03.22.NG01), the NGPC accepts the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin, and directs the President and CEO, or his designee, that the applications for .WINE and .VIN should proceed through the normal evaluation process.

Rationale for Resolution 2014.03.22.NG01

*The action being approved today is to accept the GAC's advice to the ICANN Board that **there was no GAC consensus advice on additional safeguards for .WINE and .VIN**, and the GAC "has finalised its consideration of the strings .wine and .vin and **further advises that the application should proceed through the normal evaluation process.**" The effect of the NGPC's action concerning the GAC advice on .WINE and .VIN is that the strings will continue to proceed through the normal evaluation process and no additional safeguards will be required for the TLDs.*

Dear Members of Board,

A considerable number of GAC Members have serious concerns with the Resolution 2014.03.22.NG01 as well as its Rationale and the process that has been followed to arrive at this resolution.

Despite having a GAC liaison member on the NGPC, the GAC was not aware until 26 March of this decision or its mistaken rationale. Had it been the case, the GAC could have corrected any misunderstandings and thus pre-empted the NGPC's resolution.

The action that was approved by the NGPC on 22 March and communicated on 25 March is allegedly based on GAC consensus, whereas in reality a significant number of GAC members were in consensus not to allow the .WINE and .VIN applications to proceed through evaluation until sufficient additional safeguards were in place.

There have been a series of process violations and procedural errors in arriving at this resolution. The Rationale specifically mis-states the GAC's view, mixing a lack of GAC consensus on what safeguards should be in place with a quote from a letter which was sent to the ICANN Board without it being circulated to the GAC members prior to it being sent.

Moreover a follow up letter from the European Commission which provides clarification on the above matter was not taken into account by the NGPC in its Rationale. As such, the European Union and its Member States, Norway and Switzerland request, in the

interest of the bottom-up multistakeholder model and due respect to decision-making rules and ICANN By-laws, that the NGPC reconsiders its decision and takes into account the true opinion of the majority of the GAC members.

In order to assist the NGPC in its deliberations, we refer specifically to the following six elements:

1) The letter from the GAC Chair to the Chair of the ICANN Board dated 9 September 2013 was sent without prior consultation of GAC members. As such, it represents a breach of GAC operating principle number 47. For it to have been given the weight that it deserves, and having been quoted word by word as the view of the entire GAC, the “opinion” conveyed by the GAC Chair is thus not only incorrect but misleading. The European Commission in its letter dated 3 February 2014 specifically covered this point and said "the EU, its Member States, Switzerland and Norway still believe that these general safeguards are not sufficient and that the Beijing Consensus was overruled inappropriately when the GAC Chair advised the Board to proceed with the delegation of the WINE gTLDs instead of presenting the different views on the matter and the fact that no consensus was reached."

2) As a non voting liaison on the NGPC, the GAC Chair has a duty to share with the GAC information concerning Resolutions affecting the public policy interest. Specifically under Bylaw Article VI Section 9 on non-voting liaisons it states that "non-voting liaisons shall be entitled (under conditions established by the Board) to use any materials provided to them pursuant to this Section for the purpose of consulting with their respective committee or organisation”.

This has not been done. In the GAC meeting on 26th March, having had no information from the Chair as per the Resolution, the European Commission had to ask the Chair about her knowledge of the resolution in question. In response, the GAC chair stated that this was a question that the European Commission could ask the Board in the Public Forum.

3) As a non-voting liaison on the NGPC, the GAC Chair is supposed to convey the full range of opinions in the GAC in order to assist the committee with its deliberations. In that role, it is incumbent on her to provide the reality of the situation within the GAC. The rationale of this resolution demonstrates clearly that this has not been the case.

As per operating principle 47, in United Nations practice the concept of “consensus” is understood to mean the practice of adoption of resolutions or decisions by general agreement without resort to voting in the absence of any formal objection that would stand in the way of a decision being declared adopted in that manner. Thus, in the event that consensus or general agreement is achieved, the resolutions and decisions of the United Nations meetings and conferences have been adopted without a vote. In this connection, it should be noted that the expressions “without a vote”, “by consensus” and “by general agreement” are, in the practice of the United Nations, synonymous and therefore interchangeable.

The statement that:

"The GAC has finalised its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process."

is is not a consensus view of the GAC as per the aforementioned Operating Principle, but a mere interpretation and opinion of the GAC Chair.

4) The Buenos Aires Communique specifically refers to seeking a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings. It is debatable whether the external expert legal advice is sufficiently reasoned and pertinent and whether the politically sensitive background of this matter has been considered. In addition, the Rationale for Resolution is vague and does not make reference to the specific grounds on the basis of which the resolution is taken, nor it addresses the specific arguments laid down in the legal advice received.

5) Article XI-A section 1 of the ICANN By-Laws requires that “the GAC - in addition to the supporting organisations or other advisory committees - shall have an opportunity to comment upon any external advice received prior to any decision by the Board”. This important prerogative has not been respected.

6) Notably, the Board has apparently been informed that the negotiations between the applicants and the wine rightholder organisations were close to completion, whereas in reality this is not the case. Negotiations are currently ongoing and not satisfactorily in all cases.

Thus the European Commission, the EU Member States, Switzerland and Norway respectfully requests that the NGPC reviews its decision and does not allow the strings to proceed to evaluation until negotiations have closed and sufficient safeguards are in place.

In the meantime, the European Commission, the EU Member States, Switzerland and Norway are requesting the following paragraph be included in the Singapore GAC Communique. At the time of this letter we do not know if this will be accepted by the full GAC for inclusion or not:

The GAC notes the NGPC Resolution 2014.03.22.NG01 which purports to accept GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin, as well as its Rationale. The Resolution accepts that applications for .WINE and .VIN should proceed through the normal evaluation process. In the final deliberation of the Board there have been a series of process violations and procedural errors, including the breach of Bylaws Article XI-A, Section 1. Therefore, the GAC requires to have the opportunity to consider and comment on the external advice contained in the aforementioned resolution published on the 25th of March and respectfully requests that the NGPC reviews its decision.

Respectfully submitted

Linda Corugedo Steneberg on behalf of the European Commission; European Union Member States; Switzerland and Norway.