

Our ref. : fpe/mne/107725.0000026

Flip Petillion
Contact Information
Redacted

4 September 2014

ICANN New gTLD Program Committee
Contact Information Redacted

VIA EMAIL: Contact Information Redacted

Re: 8/22/2014 Determination of the Board Governance Committee Regarding Amazon EU S.à.r.l.'s Reconsideration Request 14-35

Dear New gTLD Program Committee,

We read with great disappointment the Recommendation of the Board Governance Committee on our Reconsideration Request No. 14-27 dated 22 August 2014 (the "Recommendation") submitted by Amazon EU S.à.r.l. ("Amazon"). Among other items of concern,¹ the Recommendation advocates two very concerning notions. The first is the Board's willingness to accept the GAC advice without real investigation into the rationale for GAC advice. The second is that the Recommendation appears to give GAC advice priority over GNSO-created consensus policies. Both notions, discussed further below, are anathema to ICANN's duty to act as a bottom-up, consensus-based organization which develops its policy based on facts, and that Applicants can rely on ICANN's Reconsideration process for recourse to Board and/or Staff's inappropriate actions.

I. The Board has a duty to make reasonable inquiry into GAC advice before it can accept it.

The Board Governance Committee ("BGC") makes the following statement in its Recommendation:

¹ Amazon reserves all rights in connection with its Reconsideration Request. This letter should not be taken as an acceptance of any of the BGC's analysis and response to Amazon's Request for Reconsideration No. 14-27 ("Request"). Amazon contends the BGC has not adequately addressed any of the claims made in Amazon's Request.

“Further, insofar as the Requester argues that the NGPC failed to consider material information in failing to “conduct further inquiry of the GAC as to the basis and reason for the consensus advice” (Request, § 8, Pg. 10), nothing in ICANN’s Bylaws, the Guidebook, or the GAC’s Operating Principles requires the GAC to provide a rationale for its consensus advice.”²

While the Bylaws and operating procedures do not specifically state the GAC *must* provide a rationale for its consensus advice, the Bylaws, which the GAC is required to adhere to in its activities as an ICANN-created Advisory Committee, do require it to “employ open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice” as well as “making decisions by applying documented policies neutrally and objectively, with integrity and fairness.”³

More importantly, however, and as the BGC itself notes,⁴ Amazon argued that the NGPC failed to conduct further inquiry of the GAC’s rationale. Regardless of whether or not the GAC has a specific duty to provide its rationale, the Board does have a duty under the Bylaws to make “well-informed decisions”⁵ and it is the Board’s task to make the necessary inquiries and to check compliance with its Bylaws and Articles of Incorporation. Under applicable law, the NGPC must perform its duties in good faith and good care. This includes reasonable inquiry as an ordinarily prudent person would do in the same circumstances. As the NGPC admits in its original decision, it did not have the rationale relied upon by the GAC in issuing its consensus advice.⁶ Instead of making a reasonable inquiry into that rationale, it defaulted to the objections of two governments and inferred that rationale represented the consensus of the GAC. In addition, it failed to review other documents and correspondence in its possession at the time (and set forth in the Amazon’s Request for Reconsideration).

The Board’s actions are problematic, not only for Amazon but for the ICANN community generally and the precedence this sets. The *Board Governance Committee* appears to suggest that the ICANN Board should act on GAC advice, now and in the future, even if the GAC fails to provide an adequate (or any) rationale for such advice. ICANN cannot make decisions by applying “documented policies neutrally and objectively, with integrity and fairness”, nor transparent, community driven, multi-stakeholder based decisions, if it is not required to provide an explanation for ICANN’s actions or if it can rely on advice for which no thoughtful rationale is given. This is certainly the case if the advice came about on the basis of misinformation.

The ICANN Bylaws state:

“The Government Advisory Committee should consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues.”⁷

² Recommendation at 12-13.

³ ICANN Bylaws, Art. I, §2(7) and (8).

⁴ Recommendation at 12-13.

⁵ ICANN Bylaws, Art. I, §2(7) and (8).

⁶ “Although the NGPC does not have the benefit of the rationale relied upon by the GAC in issuing its consensus advice in the Durban Communiqué on the applications for .AMAZON (and related IDNs), the NGPC considered the reason/rationale provided in the [GAC Early Warning](#) submitted on behalf of the governments of Brazil and Peru.” Approved Resolutions: Meeting of the New gTLD Program Committee, May 14, 2014.

⁷ ICANN Bylaws, Art. XI, §2(1)(a).

As above, if the Board is neither provided with detailed rationale nor questioning the rationale behind advice, it cannot ensure that ICANN's Advisory Committees are upholding the ICANN Bylaws, and providing advice on policy that intersects with various laws, international agreement or public policy issues.

Governance acting without transparency, without rationale, without checks and balances, without consideration of multi-stakeholders within the community, and turning a blind eye on fundamental obligations and information cannot meet the standard of care required of ICANN's Board members and is not good governance. Allowing this incident of the Board's failure to make a reasonable inquiry into the factual and legal basis upon which the GAC advice is supposed to be based to go unchecked and uncorrected, sets a dangerous precedent for all members of the ICANN community, not just new gTLD applicants.

II. The Board May Not Revise its Bylaws to Give GAC Advice Priority Over Community-Created and Implemented Policies.

Of even greater concern, however, is the BGC's failure to address the fact that the Board should never have taken the GAC Advice into account – whether under the purview of the Applicant Guidebook (AGB) or the ICANN Bylaws.

The objection filing period closed in March 2013. The GAC did not issue its first advice until April 2013, but even then, and despite Brazil and Peru's attempts to the contrary, the GAC was unable to issue consensus advice against the Amazon applications. It was not until July 2013 that the GAC issued its late advice against the Amazon applications.

The Applicant Guidebook is clear. "To be considered by the Board during the evaluation process, the GAC Advice on New gTLDs must be submitted by the close of the objection filing period."⁸ "The GAC can provide advice on any application. For the Board to be able to consider the GAC advice during the evaluation process, the GAC advice would have to be submitted by the close of the Objection Filing Period."⁹ This limitation on what GAC advice the Board is allowed to consider in relation to specific new gTLDs is the product of consensus policy that was implemented in the Applicant Guidebook. And yet the NGPC ignored the timing requirements and accepted the GAC advice four months after the closing of the objection filing period, ignoring GNSO consensus policy established in the Applicant Guidebook, but also in violation of its Bylaws.

The BGC's Recommendation ignores this obligation, however, by stating, "[n]otwithstanding the Guidebook, ICANN's Bylaws affirmatively require the Board to consider any issues that the GAC may put to the Board by way or comment or advice (Bylaws, Art. XI, §§ 2.1.i and 2.1.j.). The provisions of the Guidebook regarding the treatment of GAC Advice do not supplant the requirements of the Bylaws on this subject matter."¹⁰

This logic, however, is not supported by the very Bylaw provisions cited to by the BGC, which state, "[t]he Governmental Advisory Committee may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies."¹¹ The role of GAC *advice* on Board deliberations is further clarified in the Bylaws cited by the BGC. "The advice of the Governmental Advisory

⁸ AGB at 1.1.2.7. (Emphasis added)

⁹ ABG at 3.1.

¹⁰ Recommendation at 10.

¹¹ ICANN Bylaws, Art. XI, §2(1)(i).

Committee on public policy matters shall be duly taken into account, **both in the formulation and adoption of policies.**¹²

Nowhere in the Bylaws is the ICANN Board required to consider any “comment” or advice on “any issue” as claimed in the Recommendation. It is required to take GAC advice into account in the *formulation and adoption of policy*. With respect to advice of the GAC on individual applications, specific rules and specific timing requirements were established in the Guidebook. The GAC advice in question, however, is specific to individual applications and does not relate to the formulation and adoption of policy. Reliance on Bylaws Art. XI, §§2(1)(i) and 2(1)(j) as the basis for the NGPC’s determination that it “must consider GAC advice on new gTLDs submitted after the close of the objection period” expands the reach of GAC advice beyond that which the Bylaws allow.¹³

As a result, what the NGPC, and now the BGC, argue is that they are required to accept untimely GAC advice, submitted and considered in violation of the rules of consensus policy (as documented in the Applicant Guidebook) and, in any case, have a duty to accept GAC advice on any issue (not just on issues of policy) – without making a reasonable inquiry into the rationale of that advice. This reasoning is not supported by ICANN’s own governing documents nor the very consensus policy that created the new gTLD program. Foundational to the new gTLD program are (1) the Final Report on the Introduction of New Generic Top-Level Domains dated 8 August 2007¹⁴ (the “GNSO Principles”), (2) the Affirmation of Commitments, and (3) the Applicant Guidebook. These documents are the product of tremendous time, thought, and resources, the development of which was required to be carefully implemented and followed.

The GNSO Principles require that:

“The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against **transparent and predictable criteria, fully available to the applicants prior to the initiation of the process**. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.”¹⁵

The Affirmation of Commitments requires:

“ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed **prior to implementation**.”¹⁶

The Applicant Guidebook states:

“Strings that include but do not match a geographic name (as defined in this section) will not be considered geographic names as defined by section 2.2.1.4.2, and

¹² ICANN Bylaws, Art. XI, § 2(1)(j) (emphasis added).

¹³ The BGC’s arguments regarding the need to give presumptive value to the GAC Advice and the arguments regarding the “exceptional circumstances” face are also faulty for similar reasons.

¹⁴ Available at <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

¹⁵ GNSO Principles at Recommendation 1, Mission & Core Values.

¹⁶ Affirmation of Commitments at 9.3.

therefore will not require documentation of government support in the evaluation process.”¹⁷

The Durban Advice against the Amazon applications was not only untimely and flawed, but, as accepted by the NGPC, and supported by the BGC, ignores each of the above foundational documents through de facto (1) amending the Applicant Guidebook to add “Amazon” and translations to the list of geographic terms in the Applicant Guidebook; thereby (2) changing the rules at the end of the process, rendering the process unfair, non-transparent, discriminatory, unpredictable, and not available to applicants at the beginning of the process, all in violation of GNSO Consensus Policy; resulting in (3) a violation of the Affirmation of Commitments by the Board allowing a purported “sovereignty concern” to be re-addressed after implementation of the new gTLD program.

These actions have left the ICANN Board in a very sensitive position. It can either reject the BGC’s Recommendation and reverse its decision against the Amazon applications and remain in compliance with these foundational documents and its own Bylaws, or it can accept the Recommendation and violate the Affirmation of Commitments, undo GNSO Consensus Policy, and materially amend the Applicant Guidebook after the close of the application window. More profoundly, this Recommendation brings forward the question of whether the provisions of the Bylaws regarding GAC advice permit ICANN to violate the fundamental core value and non-discrimination provisions of its Bylaws. We do not see how there can be any answer to that question except a resounding “no.”

* * * *

Amazon awaits the NGPC’s decision on Reconsideration Request 14-27 and looks forward to ongoing discussions with ICANN on these important issues.

Yours sincerely,



Flip Petillion
Crowell & Moring LLP
Contact Information
Redacted

¹⁷ AGB at 2.2.1.4.2, section 2.