

Reconsideration Request Form

Please submit completed form to reconsideration@icann.org.

1. Requester Information

Name: Annalise Eggimann, Director of Telecommunications Division,
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2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

The undersigned requests that Resolution 2014.04.04 issued by the ICANN Board New gTLD Program Committee (NGPC) be reconsidered, as it – in reaction to the letter from the European Commission on behalf of the EU Member States, Switzerland and Norway, dated 26 March 2014 and the GAC Singapore Communiqué dated 27 March 2014 which both refer to at least one process violation and procedural error, including in relation to ByLaws Article XI-A, Section 1 subsection 6 in the ICANN Board's final deliberation of Resolution 2014.03.22.NG01 – resolved that “the NGPC concludes that there has been no process violation or procedural error under the Bylaws” and “the NGPC directs the President and CEO, or his designee, to not commence the contracting process for the applications for .WINE and .VIN for 60 days from the date of publication of these resolutions in order to provide additional time for the relevant impacted parties to negotiate, which they are encouraged to do”.

The resolution is posted in the ICANN website under
<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04apr14-en.htm>

4. Date of action/inaction:

The ICANN Board New gTLD Program Committee (NGPC) took its decision on 04.04.2014 and it was published on the ICANN website the same day.

5. On what date did you become aware of the action or that action would not be taken?

The undersigned became aware of this resolution on 05.04.2014.

6. Describe how you believe you are materially affected by the action or inaction:

The Swiss Government is mandated by our Constitution to pursue the common good. We deem consumer interests and respect for applicable law as public interests. Both consumer interests and rule of law can be adversely impacted by Resolution 2014.04.04.

This Resolution merely directs the President and CEO, or his designee, to not commence the contracting process for the applications for .wine and .vin for 60 days from the date of publication of these resolutions in order to provide additional time for the relevant impacted parties to negotiate, which they are encouraged to do. It thus implies that in case the mentioned negotiations would not be successfully concluded within the set period of time, the evaluation procedure of applications to .wine and .vin would be allowed to proceed without adequate safeguards. This decision does not take into account the position of a significant number of GAC members from Europe, including Switzerland, and Latin America which is that the .wine and .vin applications should not proceed through ICANN's evaluation processes until additional safeguards are established with the agreement of the registry operators for the protection of geographical indications (GIs). There is no GAC consensus that the applications should proceed without such safeguards.

GIs are a token for reputation and typical characteristics that are directly linked to the geographical origin of the designated products. As such, GIs are important marketing tools in trade and particular relevant for wines. When purchasing from lavaux.wine, rossodelticino.wine or dezaley.vin, consumers may be led to think that they buy wine originating in the region of Lavaux, Ticino or Dézaley while this could not be the case.

Cybersquatting and all sorts of GIs abuse have occurred in the domain name space as WIPO Standing Committee on the Law on Trademarks, Industrial Designs and Geographical Indications has proved in document SCT/10/6 dated April 3rd, 2003 on "Internet domain names and Geographical Indications" (see paragraphs 225 and 226 as well as its annexes).

The power the TLDs .wine and .vin may have as a locus to find wines on the web increases the risk of deceiving acts happening, both in Switzerland and elsewhere in the world. The Swiss legislation prohibits such acts. The Swiss Federal Law on the Protection of Trademarks and Indications of Source prohibits in particular both the incorrect use of GIs and the use of designations that may be confused with them (see Article 47).

In addition to the provisions of this Law that is applicable independently of the product category, the Swiss Ordinance on viticulture and wine importation includes further specific requirements with respect to wines and provides in particular that wines designated by appellations of origin have to comply with the specifications set by the relevant Canton as regards the geographical origin and the specific characteristics of the

product (see Article 21). Geographical names, therefore, traditionally served not only as a statement of origin, but also as a guarantee of specific qualities and the maintenance of certain characteristics that must be taken into account.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

As reflected in section 6, consumers and right holders are the stakeholders affected by resolution 2014.04.04. The protection of their legitimate rights has a public value as demonstrated above. The Swiss Government represents that public interest and as such, it is also entitled to assert this reconsideration request.

8. Detail of Board or Staff Action – Required Information

In the following section, the undersigned aims to provide the necessary details to prove that:

The Board has not considered certain material information and has relied on inaccurate and misleading materials.

Resolutions 2014.04.04 NG01-NG04 are nothing more than a re-statement of resolution 2014.03.22 with a postponement of its effect and a call for the full Board to decide on the matter.

Therefore it is affected by the same shortcomings that would render Resolution 2014.03.22 null and void. These are the following:

A) The Board has not considered certain material information.

Although the body of the Rationale for Resolution notes that "*several governments provided letters to the NGPC expressing the nature of their views on whether the GAC's advice on the .WINE and .VIN TLDs should be imposed*", the list of materials and documents reviewed by the NGPC as part of its deliberations does not list any of the documents provided by the European Union which should be duly taken into account:

- Letter 1: <http://www.icann.org/en/news/correspondence/kroes-to-chehade-crocker-12sep13-en>
- Letter 2: <http://www.icann.org/en/news/correspondence/kroes-to-icann-board-07nov13-en>
- Letter 3: <http://www.icann.org/en/news/correspondence/steneberg-to-crocker-et-al-03feb14-en>
- Letter 4: <http://www.icann.org/en/news/correspondence/schulz-to-crocker-et-al-19mar14-en>

Moreover, the NGPC has carefully reviewed the responses from .vin and .wine applicants to GAC advice on the matter but has left out of the scope of its Resolution the views of several other organisations and wine-related stakeholders (including US-based wine rightholders). The following communications are also published under ICANN's correspondence site and should be duly taken into account:

- Letter 1: <http://www.icann.org/en/news/correspondence/curbastro-to-crocker-et-al-23apr13-en>
- Letter 2: <http://www.icann.org/en/news/correspondence/barbier-to-crocker-et-al-26apr13-en>
- Letter 4: <http://www.icann.org/en/news/correspondence/figueroa-et-al-to-crocker-et-al-09jul13-en>
- Letter 5: <http://www.icann.org/en/news/correspondence/cakebread-to-crocker-08aug13-en>
- Letter 6: <http://www.icann.org/en/news/correspondence/curbastro-farges-to-crocker-et-al-19aug13-en>
- Letter 7: <http://www.icann.org/en/news/correspondence/goerler-to-crocker-29aug13-en>
- Letter 8: <http://www.icann.org/en/news/correspondence/baptista-to-crocker-15nov13-en>

They all point out at harm that can be caused to consumer interests and wine right holders if delegation is done without proper safeguards. However, applicants are worried about the «commercial viability of theTLDs» if more safeguards are applied (see, for instance, June Station LLC comment to the Buenos Aires Communiqué).

ICANN has a duty to serve public interest (article I. Section 2.6 of the ICANN Bylaws and points 3 and 4 of the Affirmation of Commitments) and it should not slant towards the applicants' interests only because they are only a limited subset of stakeholders (point 4 of the Affirmation of Commitments).

B) The ICANN Board NGPC has also based its Resolution upon inaccurate and misleading materials.

B.1 Misunderstanding about GAC consensus on ".vin" and ".wine":

The action that was approved by the NGPC on 22.03.2014 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. The reality is that the GAC as a whole could not reach consensus, what does not necessarily imply that the strings can proceed through the normal evaluation process without further consideration.

The letter from the GAC Chair to the Chair of the ICANN Board dated 09.09.2013 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, the "opinion" conveyed by the GAC Chair should have been previously cleared with the GAC. The European Commission in its letter dated 03.02.2014 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." More details of this EU position can be found on the two letters sent on behalf of the EU Commission to GAC members and GAC Chair quoted above.

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

B.2 Insufficient analysis of the legally complex and politically sensitive background:

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.

The GAC has not received the terms of reference of the consultation addressed to Mr. Jérôme Passa. We wish we have received it for full transparency and proper evaluation of the NGPC action. However, it can be inferred from page 2 of Mr. Passa's report that the questions made fell short of the analysis the GAC recommended to carry out. The politically sensitive background of this matter has not been considered at all by ICANN's request of advice and the resulting report (i.e. the various attempts at creating a multilateral system of notification and registration of geographical indications for wines according to article 23.4 of the TRIPS Agreement or at launching a UDRP for GIs in WIPO).

Moreover, it is debatable whether the external expert legal advice is sufficiently reasoned. 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 or makes reference to the panoply of letters and additional materials shared with the ICANN Board via formal correspondence.

B.3 Breach of ICANN Bylaws:

Perhaps one of the most relevant arguments is that Article XI-A section 1 subsection 6 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.

Required Detailed Explanation:

The undersigned wishes to elaborate on points B.2 and B.3 contained above. Point B.1 is sufficiently developed as set forth above.

B.2 detailed explanation:

- On the process followed to seek expert external advice:

Can the NGPC provide explanations as per how and under what circumstances the legal expert/author was selected? Has there been any open and transparent competition based on a list of experts from which the author was retained? Was the expert/author chosen *ad personam*? Can the NGPC provide the necessary documentation or evidence that there is no conflict of interest between ICANN, any of the three applicants and the selected expert/author?

Taking into account that the Buenos Aires GAC Communique requested the Board to "*seek 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*" can the NGPC clarify why this question was not addressed to the legal expert/author? What is the background information, if any, submitted to him? In particular, did ICANN inform him *in extenso* of the arguments raised by the interested parties involved, by the different GAC members and the correspondence received by ICANN as a follow up to the Buenos Aires Communique?

Pending clarifications from the NGPC expressed on its reconsideration of the challenged Resolution, it stems *prima facie* from the above that the circumstances related to the selection of the expert, the drafting and presentation of this report were neither transparent, nor objective, nor respectful of other parties' rights to be heard.

- On the scope of the consultation:

Although the Buenos Aires Communique seeks clarification of the legally complex and politically sensitive background and the next steps in order to delegate the two strings (please note that the GAC did not ask for the refusal to delegate the strings), Point 3, § 2 evidences that the author has only been "consulted on the specific issue of whether, on strictly legal grounds in the field of intellectual property law relating, in particular, to the rules of international law or fundamental principles, ICANN would be bound: a) to assign the new gTLDs in question to the applicant, or, to the contrary, to refuse to assign them in order to protect prior rights as mentioned above." The question is by all means misleading and it was clear from the outset that ICANN is not legally bound by international law to automatically grant or reject an application. On the contrary, our understanding is that for all domain names for which an application was submitted, a series of legal safeguards should be put in place by ICANN or by the potential Registries in order to efficiently protect public and private rights and interests. These safeguards vary however depending *inter alia* on the nature of the domain names concerned, on the specific concerns expressed by the GAC and the objectors, on the applicable legislation.

The scope of the analysis is intentionally limited by ICANN as indicated in Point 3, § 6 since the author confirms that "Given the wording of ICANN's questions to the undersigned, this opinion will concentrate exclusively on the reasons why ICANN might be led to assign or refuse to assign the new gTLDs in question, in other words on the disputes which have arisen during the evaluation stage of the applications. It will not examine as its main focus questions and disputes likely to arise in the subsequent stage, following assignment of these new gTLDs during which the second-level domains open in the gTLDs will be exploited". In this regard, the most essential question is left out of

the analysis and therefore it does not provide the necessary insights for the NGPC to respond adequately to GAC's requests.

As a consequence, half of the report (until "Secondly") is useless. Of course, "vin" and "wine" are generic terms and are not protected by geographic indications or any other intellectual property right. So, ICANN is obviously legally unimpeded to grant those TLDs to whoever applies for them. But, that is not the question that has held up GAC advice for a year.

The NGPC has chosen to stick to this part of the report to accept "GAC advice" to proceed with the evaluation process without additional safeguards and does not reason on the concerns expressed by Governments and right holders or on the considerations expressed in other sections of Mr. Passa's report. Thus, Resolution 2014.03.22.NG01 is ill reasoned.

- On the author's opinion on the scope of GIs:

The second part of the report is severely wrong. He indicates that "a geographical indication does not enjoy absolute or automatic protection against any use of an identical or similar name by a third party", and refers to Article 22 of the TRIPS agreement which allegedly provides for protection where an indication is used in a manner which misleads the public. He further indicates that there are other provisions (i.e.: the Lisbon Agreement of 1958 or the EU relevant legislation (EU) No 1308/2013 on wines) that allow for a more extensive protection that includes the concept of evocation.

However, not only Article 22 of the TRIPS agreement also broadly encompasses (see point 2.b) thereof) "any use which constitutes an act of unfair competition (...)"; but in addition, Article 22 of the TRIPS agreement is an incorrect legal basis as far as wines are concerned. Actually, wines (and spirits) enjoy an additional explicit protection under Article 23 of the TRIPS agreement which is considered in international fora as including the aforementioned concept of evocation, and which does not require any "misleading test" to be performed. Concretely, should an operator use the term "JapanChampagne.vin" there would be a clear indication of the actual origin thereof, so at first sight no misleading of the consumer as to the geographical origin, and accordingly no infringement of Article 22 TRIPS; but there would be nonetheless a clear violation of the relevant Article 23.1 TRIPS which prohibits any inappropriate use of a geographical indication, including in translation and where the true origin of the product is indicated.

- On the need to lay down adequate safeguards:

The most rightful conclusion of the report has not been taken into account by the NGPC. Jérôme Passa concludes that if there are indications that GIs can be subject to abuse as second level domains, ICANN should take precautions to prevent damage from being done (points 10 and 11). Indeed, the NGPC should be aware of the long history of abuse of GIs under other generic TLDs. WIPO has conducted studies, like the one mentioned above, on the matter with a view to setting up a UDRP for GIs.

Nonetheless, it is not enough to force the Registry to remind registrants of third-party rights, as Jérôme Passa suggests. There should be an enforcement mechanism which until now remains the main stumbling block in this process. This mechanism can only be

decided by ICANN.

B.3 detailed explanation:

The NGPC is bound by the Bylaws. Article XI Section 2.1 of the Bylaws –which Resolution 2014.03.22.NG01 refer to- is not the only section the Board must comply with in the implementation of the new gTLD programme. The Applicant Guidebook is not self-contained as the rule governing the gTLD programme and does not override the Bylaws, which is the superior norm to abide by.

Article XI-A Section 1 is also relevant as it details the procedure ICANN must follow to seek external expert advice. At least, two breaches have been committed in relation to the report commissioned to Mr. Passa:

- Article XI-A Section 1 3 b as to the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice.
- Article XI-A Section 1 6 regarding the need to consult, among others, with the GAC on the analysis received before taking any action.

In addition to the shortcomings that would render Resolution 2014.03.22 null and void, Resolution 2014.04.04 fails to take into account the Singapore GAC Communiqué and the letter addressed by the European Commission on behalf of all EU member states plus Switzerland and Norway to the Board on 26th March 2014, even though they acknowledge them.

The GAC communiqué states: "The GAC needs to consider the above elements more fully. In the meantime concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter."

Neither of these statements has been considered. Concerned GAC members did not request to set a deadline for negotiations to come to an end, mindful as we are that they are counterproductive to arrive at agreeable solutions (experience learned from the tight deadline set in the Durban GAC communiqué, Section IV.2).

The EU Commission letter contains a similar request: "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."

If the NGPC had really considered this advice, it would have stalled the evaluation process indefinitely.

9. What are you asking ICANN to do now?

The undersigned respectfully request from ICANN to:

- a) reverse its Resolution 2014.04.04 and thus consequently its Resolution 2014.03.22.NG01;
- b) while reconsidering, take into account the existing materials disregarded at the time of the NGPC Resolution 2014.03.22NG01 and 2014.04.04 and listed in Section 8;
- c) grant sufficient time to applicants and interested parties to define the necessary safeguards for the .wine and .vin gTLDs, in order to reach a proper agreement before the delegation of the .wine and .vin gTLD strings, without a deadline.

10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

As a member of the GAC, the Swiss Government has a duty to ensure that the public policy interests are taken fully into account in all ICANN decisions. This public interest mandate includes consumer protection, protecting legal rights, preventing fraud, combatting criminality and protecting the legitimate interests of business stakeholders including entrepreneurs, investors, and innovators. Switzerland considers that these public policy interests can be adversely impacted by Resolution 2014.04.04.

Given the worldwide coverage of Internet, the delegation of the strings .wine and .vin without adequate safeguards aiming at ensuring the protection of GIs against undue appropriation would potentially entail huge potential confusion for the consumer, considerable losses for the right holders of these GIs, and extremely high costs in seeking judicial redress. Furthermore, such a situation would be detrimental to the on-going negotiations at international level on the protection of GIs. Our national legislation concerning GIs in the field of wines is mentioned above (see point 6 above). The Swiss Government is also mindful of its international obligations and commitments in respect of tackling misuses of GIs, in particular those arising from Article 23 of the TRIPS Agreement that requires Members to provide the legal means for interested parties to prevent use of a GI identifying wines in respect of wines not originating in the place indicated.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?

Explain.

The undersigned represents the Swiss Government and represents Swiss citizens and undertakings in the defense of the public policy interests that concerns them in the case in hand.

Do you have any documents you want to provide to ICANN?

The relevant documents are linked in the text of the Reconsideration Request.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.



17th April 2014

Signature

Date